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ABSTRACT

Providing explanatory information regarding the legal principles and issues affecting Catholic school educators, this handbook summarizes student rights, contractual arrangements, and state and federal requirements as they apply to parochial schools. The legal issues involved in torts of negligence, including establishment and violation of educators' duties toward students, proximate cause, and injury, are discussed. A further section reviews specific topics such as discrimination, law enforcement, restraint and corporal punishment, school records, search and seizure of student property, free speech, student publications, and suspension and expulsion. Each topic is accompanied by discussion questions, hypothetical examples, and case citations. The book closes with suggestions for the development of due process policies. (JEH)

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The Law, the Student, and the Catholic School

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Dedication: To the future. . . .

Rachel, Jennifer and Matthew Pennuth
Jonathan and James Mawdsley
Michael and Colleen Daly

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Many people deserve our gratitude in the development and publication of this text. At the top of our "list" is Sister Kathleen Short whose vision of the importance of school law to Catholic education initiated presentations on the topic at NCEA Summer Institutes throughout the country. She remains an inspiration in our work.

This volume began and concluded through the encouragement and coordination of Sister Carleen Reck, Executive Director of the NCEA Elementary Schools Department. We are grateful to her and to others who contributed through critiques and suggestions: Msgr. Francis X. Barrett, Executive Director, NCEA Chief Administrators of Catholic Education; Rev. Robert J. Yeager, Executive Director, NCEA Secondary Schools Department; Bro. John Olsen, former Secondary Director; the Department of Elementary Schools Executive Committee; Sr. Madonna Schmelzle, Superintendent of Green Bay Diocese; Mr. Daniel Kerns, Principal of Our Lady of Lourdes School and law student, Bethesda, Md.; and Bro. David Delahanty, Associate Professor, Manhattan College, Bronx, N.Y.

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Also to be noted are our spouses whose patient endurance of harried deadlines and interrupted schedules served to maintain us in this and other works. Our love to them.

FOREWORD

Virtually all of the published material on school law is written from a public school perspective. This creates serious problems for the personnel in Catholic schools as they must deal with frequently changing court decisions, laws and rules which govern their activities.

The authors of *The Law, the Student, and the Catholic School* have done much to relieve the anxieties of Catholic educators by writing a book which clearly meets their needs—and it does so with simplicity, style, and substance. Too often school law texts are written so that only legal experts can understand them. In this book the legal principles are obviously developed and clearly stated in a manner that the Catholic school practitioner can understand and apply.

The cases cited are current and important, demonstrating solid legal research. Questions and answers at the end of each chapter provide a unique opportunity for the reader to reflect on the material, then contrast and compare responses with those of the authors, thus providing an immediate self-evaluation of the reader's understanding of the subject.

This book will give one the background to face with confidence and a proper response the common legal problems which might arise. More importantly, it provides advice on how to prevent legal troubles from occurring in the first place. *The Law, the Student, and the Catholic School* is a basic reference that should be in the professional library of every Catholic school.

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INTRODUCTION

Catholic educators have been increasingly concerned about legal issues which affect Catholic schools and their students. Legal challenges to teachers and administrators have been increasing dramatically. Thanks to the editor and co-authors of this volume, Catholic school educators now have a basic resource to raise consciousness of the law, a reference manual, and a practical tool for staff inservice. It needs to be recognized that no text of this limited size can answer every question raised about the law as it applies to our schools. In addition, the law is not a static entity, and continued study beyond the scope of this text is necessary.

Considerable attention is given in this volume to negligence because it is a most vital issue today; shorter sections on other specific topics offer direction for policy and for action. We encourage the Catholic school educator to learn basic considerations and precautionary measures from this volume. Since, however, many school legal issues are based in state law, the Catholic educator should consult with legal authorities on the local, diocesan, or state level concerning specific cases.

We encourage the entire school staff to study and discuss each section of this book—developed to focus on *The Law, the Student, and the Catholic School.*

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I
OVERVIEW AND LEGAL CONCERNS

Law in our society has been often revered as an essential ingredient of our nation's democratic philosophy and as a necessary sign of our desire to avoid chaos, be it in the broader context of society or in the school classroom. No stronger pronouncement of the importance and meaning of the law can be found than that of President Abraham Lincoln when he proclaimed:

> *Let every man remember that to isolate the law is to trample on the blood of his father, and to tear the character of his own and his children's liberty. Let reverence for the law be breathed by every American mother to the lisping babe that prattles on her lap; let it be written in primers, spelling books and almanacs; let it be preached from the pulpit, proclaimed in the legislative halls, and enforced in courts of justice. In short, let it become the political religion of the nation.*

This impassioned plea has inspired a set of guiding principles which balance the values of individual freedoms with societal needs for order. Our Founding Fathers, acting on their rich moral and religious background, developed a Constitution based on individual rights and incorporating a system of checks and balances between government involvement and citizen redress.

Since the landmark case of *Tinker v. Des Moines Independent School District*[1] in which the United States Supreme Court clearly placed students as "persons" under the Constitution, there have been multiple suits in a variety of areas against both teachers and administrators. Apparently, some public and Catholic school educators alike have viewed this situation with great alarm and overcompensated for such rulings with the belief that the "best" reaction to a student discipline problem is simply to ignore it and avoid potential consequence. Neither a sense of justice, a minimal understanding of the law, nor the need to maintain order in school justifies such a posture. The ability of principals and teachers to effectively deal

with discipline problems in Catholic education relies on understanding the law, not running from or overreacting to it. While parts of the legal process are indeed complex, the guiding role is and always has been that common sense, fairness, and knowledge of the law are the best guides in dealing with problems in student discipline.

Student Rights in Catholic Education

One of the great misunderstandings in discussing the rights of students in private schools, be they religious or not, is the apparent assumption that these rights are essentially the same as for students in the public sector. Such is clearly not the case.

Catholic schools do not operate within the same set of constitutional restrictions as do public schools. Because private schools are not agencies of the state and thus do not come within provisions such as "free speech" constraints of the First Amendment nor "due process" guarantees of the Fourteenth Amendment, such schools are not required to furnish a broad range of constitutional rights to their students. In order to "claim" constitutional rights in a Catholic school, the student must either have been given these rights through school policy or established that the school is intrinsically involved with the state. This concept of intrinsic involvement has been termed "state action" and, to date, no case known to the authors which involves disciplining a student in Catholic education has led to a student successfully convincing a court that constitutional rights were due them.

The leading case in this area of Catholic school law is *Bright v. Isenbarger*.[2] It should be carefully reviewed. In this case, two girls had been expelled from Central Catholic High School in the Diocese of Fort Wayne-South Bend for leaving the schools grounds without permission. The girls alleged violation of due process rights and attempted to show state action because (1) there was general supervision by the State Board of Education; (2) the State guaranteed tax-exemption status to the school and; (3) the school rendered a public function, namely education.

In rejecting the girls' arguments that these criteria were

sufficient to constitute "state action," the Court went further in suggesting several key statements contrasting student rights in the public and private sector.

- -Private schools perform valuable social function by providing diversity that the government may not and should not provide in the public schools.
- -Because it is nongovernmental, private education is not restricted to the same nonpartisan and secular goals as is public education.
- -Private schools may provide religious instruction, propagate a sectarian viewpoint, and conduct religious services which public schools may not.
- -Private schools may emphasize moral development and strict discipline in ways which public schools may not employ.
- -Private schools may discourage criticism and irreverence toward existing institutions or policies while public schools may not.
- -Private schools may impose discipline in conformity of dress, speech and action, such as found in military schools and to lesser extent in most private schools, which public schools may not.

While other cases such as *Huff v. Notre Dame High School*[3] and *Family Forum v. Archdiocese of Detroit*[4] have sustained the rationale that Catholic school students cannot establish "state action" and cannot challenge expulsions on grounds of denial of Constitutional due process, it would be erroneous to overgeneralize that courts perceive students in parochial schools as having no rights.

Despite the fact that courts are not willing to find "state-action" in discipline situations in non-public schools, courts are concerned that there be some minimum level of fairness before a student's violation of school rules results in suspension or expulsion. Such a stance is certainly in concert with common sense, compassion and Judeo-Christian justice. (See "Toward a Due Process Model.")

Contractual Arrangements

A key portion of the "rights" of a student in Catholic education normally derives from the contractual arrange-

ment between the school and the parents and/or the rules of the school covering student conduct. As part of the contractual agreement, there are explicit (expressed) and implicit (implied) expectations placed on both parties. In general, the student attends the school under the "rules and customs" of the given school. These rules may be both written and unwritten and may include such things as school catalogues and student handbooks as well as current rules and regulations. Should the school (or diocese) decide, based on a sense of justice, that there is need for policy involving due process procedures for students, such a policy may well become part of the contractual agreement and the school may not arbitrarily withdraw the policy if a difficult case arises. If a diocese decides to adopt due process procedures, these may well fall within its contractual obligations with the student and their parents.

An excellent example of a school fulfilling its obligation for appropriate fairness is that of *Flint v. St. Augustine High School*.[3] In this case, two students who had been expelled for smoking sought reinstatement. The court sustained the expulsions because "there were here present such minimum safeguards as were required to take the actions of dismissal out of the ambit of being arbitrary or capricious or without probable cause." The Louisiana Court observed that the Catholic school had "a *near* absolute right and power to . . . dismiss students." As long as the students in the Flint case *knew the school rule against smoking existed and understood that the penalty of expulsion would be involved*, the Court would not probe into the reasonableness of the rule.

State/Federal Requirements

A second area of student "rights" in Catholic education includes statutes that are developed by state or federal legislatures requiring Catholic schools to conform to certain rules. For example, the Civil Rights Act (see "Discrimination") or individual state health, safety, and certification codes affect Catholic schools.

The status of student rights in Catholic education needs

to recognize that the complexity of court structures does not allow overgeneralization. It also reaffirms the need for each reader to know the legal framework for one's own diocese. For instance, laws affecting corporal punishment are determined state by state. Hence, one state (e.g., Maine) can prevent the use of corporal punishment in the school while others (e.g., Illinois) may allow its use. In those states that prevent corporal punishment, this prohibition would need to be examined to determine if it is applicable to Catholic schools.

It should also be noted that while court decisions in public school cases involving discipline do not necessarily bind Catholic schools, they sometimes do offer excellent guidelines that private schools might selectively view and decide to adopt. For instance, the procedures offered in the corporal punishment case of *Baker v. Owen*[4] (see "Corporal Punishment") or those suggested for suspension and expulsion in *Goss v. Lopez*[5] (see "Suspension and Expulsion") appear well developed. A school may consider those guidelines *if* it wishes to address those issues from a sense of fairness arising out of Judeo-Christian justice, not as a result of a judicial mandate.

Due Process

Again we suggest the need to focus on both the fairness of a given rule (substantive due process) and the reasonableness of the process used to implement such decision (procedural due process). Examples include: Is it fair for one student to be treated differently when caught smoking? Are the rules of the school dealing with school discipline vague? discriminatory? inconsistent with school philosophy? Schools should test for fairness in the rules and regulations that govern the school.

It is highly desirable that the rules developed for school discipline follow the guidelines established by Reutter[6] who, at minimum, suggests that rules a) be known to students beforehand in writing, if possible; b) have a legitimate educational purpose; c) be clear in language; and d) be consistent with school philosophy.

Primary concern for implementation of a disciplinary act should emphasize a process that is, first of all, known by the students. In addition, students should have an opportunity to present their side of an issue. School discipline procedures should provide such opportunities to assure a fair and equitable process.

Overview and Legal Concerns

Discussion Questions

1. The authors have suggested that the basis of our Constitution is an emphasis placed on "individual rights." Is this concern for the individual consistent with your personal and school philosophy?

2. What might be some constraints on "individual rights" that may be necessary to prevent societal chaos? school chaos?

3. Are parochial schools "better off" given their standing in regard to the Constitution than the public schools? Discuss some advantages and disadvantages.

4. Review some of the disciplinary rules used in class or in the school. Do you feel they provide a basis of *substantive* due process? Are the rules clear? Are the means for implementing a decision reasonable within the framework of *procedural* due process? How might they be amended, if they do not conform?

5. If laws are inconsistent from state to state and region to region, what might be the rationale of the United States Supreme Court (or state courts for that matter) for *not* wanting to step in and decide issues?

6. How good is the "Contract" between parents and your school? Is it clear that each has certain obligations in return for what the other party provides?

7. Are copies of the state laws affecting your school available and understood by teachers and administrators? Have they been discussed to make sure all are aware of implications?

Commentary Related to Discussion Questions

1. It is not unusual for a person in a position of leadership to have his/her concept of personal rights blocked by official responsibilities. This phenomenon is especially evident in the non-public sector where constitutional rights generally are not applicable. The same non-public school educator who would demand his full complement of substantive and procedural rights if he were charged with a crime or sued civilly may not make the transfer and consider the substantive and procedural rights of staff and/or students. Even though the U.S. Constitution does not mandate the application of constitutional rights to the non-public sector, it may be well to consider the voluntary extension of such rights by asking, "Is it fair?" rather than "Is it required?"

2. Everyone is familiar with the Holmesian criticism that "your right to swing your fist ends where my nose begins." Similarly, there is no protected constitutional right in falsely yelling "fire" in a crowded theater. The State must assert itself through its law-making functions if it is to protect its citizens. With regard to any individual rights, the State's interests take precedence over such rights when the State can demonstrate a compelling interest. Four areas where the State's regulations have often been upheld against claims of individual rights have been the State's efforts to promote a healthy citizenry, a safe citizenry, a moral citizenry, and an educated citizenry. The extent to which the State's interests win over claims of individual rights depends upon the nature of the individual right, the sincerity with which the right is held, and the social impact of protecting the individual right.

3. Advantages:
   a. Ease of removing problem students.
   b. Ease of removing unsatisfactory teachers.
   c. Promulgation of rules does not have to be concerned with substantive due process.
   d. Total censorship over curriculum and library.
   e. Student security from other student aggression.

   Disadvantages:
   a. Possibility of summary handling of student problems without concern for fairness (due process).
   b. Possibility of regimentation.
   c. Total censorship could prevent students from learning about real life situations.

4. Answers will vary.

5. The relatively few cases involving non-public schools can be attributed to:
   a. Selectivity in accepting students and thus fewer severe discipline problems.
   b. Very explicit contract rules and regulations for teachers and students.
   c. General inapplicability of the 14th Amendment and the Civil Rights Act to non-public schools.
   d. Availability of other educational options (e.g. public schools) if a student is removed from a non-public school.
   e. General reluctance by parent of non-public school students to sue non-public schools.
   f. Generally a different kind of parent, whose willingness to make the financial sacrifice for non-public education includes support for the school's rules and methods.

6. Non-public school contracts with parents are sometimes negotiated, particularly with regard to tuition. Once an

agreement is signed, it is binding on both the school and the parents to uphold agreements, explicit and implicit in the contract. The key concern is how clear the expectations are on behalf of both parties. Does the school recognize that the rules of conduct and their enforcement are part of its obligation? Does the parent recognize that signing implies agreement to all these rules and such other specifies as due date of tuition payments, etc.?

7. Answers will vary.

Overview and Legal Concerns

Notes

[1]393 U.S. 503 (1969)
[2]314 F. Supp. 1382 (N.D. Ind. 1970)
[3]456 F. Supp. 1145 (D. Conn. 1978)
[4]347 F. Supp. 1167 (E.D. Mich. 1972)
[5]232 So. 2nd 229 (La. 1976)
[6]395 F. Supp. 294 (M.D. N.C. 1975), aff'd mem. 423 U.S. 907 (1975)
[7]419 U.S. 565 (1975)
[8]E. Edmund Reutter, Jr. *The Courts and Student Conduct* (Topeka: National Organization on Legal Problems of Education, 1975) pp. 2-5.

II
NEGLIGENCE

Must a teacher step in to break up a fight? Can a school be sued if an accident occurs in class or on the playgrounds? Do field trip slips really protect the school and the teacher? What circumstances make an act negligent? Are administrative and teacher negligence the same?

The questions and fear about potential suit for purported acts of negligence are of great concern to all educators and they should be. First, the number of suits in this area are very significant because "of all the lawsuits filed against teachers and administrators, negligence is the most prevalent."[1] Secondly, the area of negligence is one in which the difference between public and private sectors becomes basically a non-issue and the private school teacher or principal is generally held to the same standard of care as a teacher or principal of a public school in the given state. Third, the essential act of negligence for which a person would be liable suggests an injury to a student. Knowledge about negligence may prevent an injury.

It is very necessary to understand that negligence laws are a function of each state and, in fact, vary from state to state. Negligent acts are considered as "torts" or civil (not criminal) wrongs against a person or his/her property. Some states offer varying degrees of statutory protection against negligence suits so it is important for readers to know the laws of their given states. However, even degrees of immunity should not cause one to feel comfortable in doing something which could be negligent. The number of states *removing* statutory protection from negligence suits is on the dramatic increase.[2]

Negligence has been described and defined in a number of ways. It is a common law concept indicating fault when a person is responsible for "the unintentional doing or not doing of something which wrongfully causes injury to another."[3] It "may involve *doing* something that a reasonably prudent person *would not* do under the circumstances or *not doing* something that a reasonably prudent person

would do under the circumstances."[4] In the most pragmatic sense, negligence is the absence of care which occurs from doing something you should not have (commission) or not doing something you should have (omission).

The concept of negligence can be somewhat simplistically but appropriately perceived as a product of four integrated factors. Should any one of the factors be absent, there would be no liability for negligence.

Establishment of Duty

The first of these factors is the important element of *duty or responsibility*. One begins by answering the question of whether or not the person being sued had the duty or responsibility for the student(s) in a given set of circumstances. For instance, it is clearly the duty of teachers to appropriately supervise the students under their charge or make provision for their supervision if there is a need to be absent (going to the bathroom, for instance). One noted source states that "lack of proper supervision constitutes negligence."[5] For a principal, the most obvious "duty" is the promulgation of reasonable rules to govern the school and an established pattern of making sure the rules are followed.[6]

Violation of Duty

The area of responsibility and duty is closely aligned with a second element of negligence, *violation of duty* (responsibility). When duty (responsibility) has been established, a more difficult judgment is necessary as to whether or not that duty has been violated. The key to this element is a focus on the question of whether the teacher/principal took appropriate action in an attempt to prevent the student from "reasonably foreseeable risk of harm." Note that courts are not suggesting that educators become literal insurers of student safety at all times and in all places, but rather that they concern themselves with situations where "the risk involved must be both foreseeable and unreasonable."[7]

In a Minnesota case,[8] negligence was determined against a teacher who had allowed 10 minutes of pebble-throwing to go on before a student was injured. However, in a Wyoming case,[9] no liability was found for a school aide nor the district when a student was partially blinded after a small rock thrown by a classmate bounced off a larger rock. In the Minnesota case, foreseeability of risk because of previous pebble-throwing was evident, but not so in Wyoming where no rock throwing preceded the injury and adequate supervision was present. Another interesting case occurred in New Jersey when a principal was held liable because "he had announced no rules with respect to the congregation of students and their conduct before entering the classroom . . ."[10] which contributed, according to the court, to an injury to a pupil who was hit with a paper clip shot from a rubber band of another student.

Proximate Cause

A third element of the negligence concept is that of *proximate cause*. The question asked is normally, "did the educator's action or inaction" have a material and immediate effect in producing the injury? The non-intervention of the teacher in the Minnesota example above was perceived to be the proximate cause of the injury as was the principal's failure to have rules developed to cover the New Jersey paper-clip case. Once again, circumstance plays a key role. The question is whether proper supervision could have prevented the harm.

In a case[11] in which a teacher left her students doing push-ups, a student moved from his assigned position and kicked a girl in the head, damaging the girl's teeth. While the teacher may have been negligent in leaving the class, the court suggested that her absence was not the proximate cause in this case which was, rather, the student's action in moving from his position. Although the case could have been decided differently with variance of circumstance, it does illustrate a case in which the teacher's activity was not perceived to be the proximate cause of the injury and, hence, no negligence was established.

Injury

The fourth and final element needed to establish negligence is *injury* which, to date in case law, is to be physical in nature. It is understood that accidental injuries do occur without any negligence; typical defenses by teachers and principals include such arguments as students contributing to their own problem (contributory negligence) and the view, in some instances, that the accident causing the injury was a "pure" accident or an "act of God" (e.g., lightning striking a pole which injures a child with no warning).

A look at many court cases dealing with negligence suggests further principles of note in the protection of school personnel and students from harm. The greater the potential harm to the student and/or the greater the vulnerability of the student, the greater the need for close supervision and care. A simple rule to apply here is that the younger a student is *mentally* or *chronologically*, the greater the standard of care that needs to be applied.

A court will also look closely at each set of facts and circumstances relative to a given situation. It is recognized that while school employees are not literal "insurers" of student safety, there is the continuous obligation to focus on and prevent "reasonably foreseeable risk of harm." Thus, particular care should be given to such things as field trips or supervision of the playground where risk of harm is likely to be higher than in the ordinary classroom setting.

Trips

Excursions for students away from the school, be they for short field trips or longer journeys such as senior class visits to far away places, should be viewed with great scrutiny and very careful planning. One needs to balance the educational value of such trips with the potential liability to the teacher, administrator, and school—should a negligent act occur.

Two rules of thumb to remember are (a) the greater the potential danger of the circumstance, the greater the need

to supervise and (b) the younger the student, mentally or chronologically, the greater supervision necessary. Therefore, moving out of the classroom into the field causes increased need for care, particularly on longer trips in which dangerous and unsupervised activities might take place. It is interesting to note that some schools and teachers believe that any potential liability is waived by using a "waiver and release" form. Such an assumption is unwarranted and such forms are normatively viewed as of little, if any, legal aid should a negligent act be established against a teacher or administrator.

As in other negligence situations, the school and its personnel have a duty to protect students from reasonably forseeable risk of harm on any trip sponsored and supported by the school. Because, however, the risk is increased on such a trip, the standard of care will likely be higher and all should take extra caution in trying to anticipate problems and deal with them beforehand.

Some suggestions in this area are to consider such things as (a) checking the validity of signatures on trip forms; (b) keeping at school students likely to cause problems on a trip; (c) allowing "difficult" students to go only if chaperoned by their parent; (d) increasing the number of supervisors when the students are younger and risk is greater; (e) providing written rules of conduct for students (in the handbook, specific field trip form, etc.), including a provision that suggests that *any* activity different from those outlined for the trip would occur only after explicit approval by the teacher. Should something happen, the court will take these types of anticipated activities under consideration. Also note that because an injury occurs, it is not automatically the result of a negligent act. The key will be whether the failure to exercise a duty is the proximate cause of the injury.

While field trip forms are not the significant and forceful legal defense that some have wrongfully believed, they should still be used. What they do accomplish is communication to the parents regarding certain particulars about the trip with expectations of the school, teachers, students

and parents. A suggested form is offered below and might well be considered when designing or revising the school form.

Field Trip Form (Sample)

I. DESCRIBE THE TRIP
(describe the place to be visited, the method of transport, the type and time of the supervision, the time of departure and return, the place of return.)

II. OBJECTIVES OF FIELD TRIP
(describe objectives e.g. observe natural setting along the river, such as flowers, erosion, birds, fish, soil.)

III. PROVIDE SPECIFIC UNIQUE MATERIALS TO BE BROUGHT
(Lunch, extra set of clothes, monies.)

IV. INSTRUCTIONS TO BE GIVEN TO STUDENT BY PARENT AND TEACHERS
(e.g. 1. a river is dangerous
2. do exactly what teacher requires
3. stay in the group (if required)
4. (any further instruction the teacher wishes to include)

V. BY SIGNING THIS FORM, I (the parent or guardian) certify that I request and give my permission for _____ to go on this Field Trip. I have given the instructions required above, and I release the teacher, principal and school from all liability and waive any claims against them.

_____
Parents' Signatures

Of course, one way to financially protect the school and the teacher is to obtain liability insurance. Such insurance protects against financial liability in the event of negli-

gence by the school or teacher and resultant injury to the student. All schools should have liability insurance and all teachers should protect themselves by purchasing liability insurance for negligent acts which cause injury.

Professional liability insurance for educators is available through the National Catholic Educational Association. Like most policies, the coverage applies to all school-sponsored activities, but does not include use of automobiles. In the event that private cars are used to transport students for school activities, schools should check school/parish fleet auto insurance and personal auto insurance of the individual drivers to confirm that sufficient coverage is available.

The ultimate protection is to avoid injury by knowing your *duties* and exercising a *reasonable degree of care.*

SUGGESTIONS:

The following are some excellent recommendations, modified and gleaned from a Legal Memorandum[12] dealing with negligence.

1. a. An assembly or other meeting should be held periodically in which school rules for the safety of students are reviewed with both students and staff.

   b. When instructions for the safety of students are issued, the age and ability of the student must be taken into account. If there are any special categories of students for whom different standards would apply (such as physically or mentally handicapped youngsters), special rules may be necessary.

   c. There should be no time during the day when each student is not under supervision of a member of the staff.

   d. The staff should be instructed to report all dangerous

conditions so that the principal may take steps to correct them. All such reports should be acted upon immediately.

e. Appropriate warning signs should be posted in shops, parking areas, and other potentially dangerous places.

f. All field trips should be approved by the principal. If there are any questions concerning the trip, the principal should investigate the matter and either disapprove the trip or impose appropriate limitations. Only students whose parents have signed permission slips should be permitted to go on the trip. The slip should indicate an acknowledgement by the parents of the nature of the trip and the time the school's supervision of students will end. While such permission slips *do not absolve school personnel of responsibility for negligence*, they are important evidence that the parent had knowledge of, and gave consent to, his child's participation.

g. The principal should consult his school or diocesan attorney as to whether private vehicles may be used to transport students to athletic and other school events.

h. Either by a general procedure or by specific instruction, the principal should always designate someone to be in charge when he/she is not present.

2. In addition to the above are the following suggestions:

a. In high risk classes (physical education, industrial arts, home economics, etc.) class sessions and *material* should reflect lessons on safety with a given instrument or tool *before* the student uses it. First utilization should be carefully supervised by the teacher.

b. A school policy should state that, unless the school specifically approves an activity, the school will not be held liable. Non-school sponsored activities that involve students and a teacher or teachers "volunteering" to chaperone should not be discussed or organized within the school. Potential liability may be attested.

c. Check your personal and professional insurance standing in case of suit. Do you know what you are protected against and how much protection you have? (NCEA has a liability policy available to its members.)

d. Try to have field trip sites invite you to see their facilities rather than ask to go.

e. Have your parental permission slips so stated that the parents request school permission for the students to go on a given field trip.

f. All injuries should be promptly reported to any applicable medical insuror to protect right of payment. Prompt payment of medical bills may not prevent negligence law suits, but will eliminate anxiety about payment. If a negligence action is filed, notify your liability insuror at once.

Discussion Questions

The first three questions are for inservice discussion only. The cases in Section 4C have some suggested answers which follow.

1. Specify three areas which you believe are definitely duties of a teacher (or principal). How might those duties be violated? How could such violation be prevented?
2. Do you believe supervision of students in your school is an "adequate" standard of care to prevent a successful negligence suit? What classroom and school rules could be modified to help prevent "reasonably foreseeable risk of harm"? (You might want to spend at least one in-service meeting on this one).
3. What personal practices might get you into difficulty in the area of negligence? (e.g., Leave the shower area too soon, gone from the class too often, etc.) Note that these are fairly easy to correct.
4. We will repeat some of the information given in the text for you to apply to the cases which follow. Read each of the cases and attempt to determine whether or not the teacher might be held negligent in a court of law.

A. Definitions of terms (A reminder)

1. *Negligence* is a concept of common law connoting legal fault whereby one party becomes liable to an injured second party for an injury attributable to the unintentional conduct of the first party.
2. *Negligent Conduct*, in its simplest definition, is that conduct in which a reasonably careful person would not engage. Negligence may involve doing something that a reasonably prudent person would not do under the circumstances or not doing something that a reasonably prudent person would do under the circumstances. Circumstances

play a crucial role in the determination of negligence.

B. **Determination of Negligence**

1. *Duty*. Is the activity the teacher's responsibility?
2. *Violation of Duty*. What were the circumstances that contributed to the non-performance of duty?
3. *Proximate Cause*. Was the accident avoidable, unavoidable, foreseeable? At what time did it happen? Is negligent supervision the proximate cause even though the immediate precipitating cause of the injury may be student misconduct? Did what the teacher do or not do have a material and substantial effect in producing the injury?
4. *Concept of Injury*. What (physical) injury occurred?

C. **Cases for discussion**

1. Miss Jackson, a high school physical education instructor, lectured her class on the proper use of the trampoline. She explained some simple moves and demonstrated them for the class. When the class urged her to do more, Miss Jackson performed some difficult moves including a double-back flip which drew a round of applause from the class. Miss Jackson then stood around the trampoline to supervise the class activity. When Sheila mounted the trampoline she attempted a double-back flip which was not part of the instruction. As she landed she lost her balance and was thrown to the floor breaking her ankle and wrist.
2. Same case as #1, except Miss Jackson is called out of the gym by the Dean of Women who is looking for a truant girl. Miss Jackson was gone for about five minutes when the accident occurred.
3. Although the school rules strictly forbid the throwing of snow balls, George and Carl got into a snowball fight during recess. Mrs. Murray let the activ-

ity go on because "boys will be boys." George was struck in the face, his glasses were smashed, his nose was broken and his eyesight impaired due to glass fragments.

4. The Pep Club, a school sponsored organization, was having its initiation but the advisor was not invited, nor did he know of the initiation. The initiation took place after school at the home of the club's president. The initiates were blindfolded, led into the back yard, and disoriented. They were led to believe that they were standing next to a swimming pool and ordered to jump. Normally they would descend only a few inches to a level surface. As it turned out the jump of one of the initiates was onto a sloping ground and he was injured.
5. Mrs. Williams' first grade class was making Valentine cards for their families as part of an art project. Mrs. Williams was sitting at her desk assisting individual students and the children worked noisily—cutting, pasting and printing. During the project a couple of students began shoving one another. The disturbance lasted only a few minutes with the result that a pair of scissors was rammed into Kimberly's eye. She lost the sight in that eye.
6. Mr. Johnson's sixth grade was excited about the annual field trip to Starved Rock State Park. In fact, the [illegible] became rowdy as they boarded the bus. When they arrived at the park, Mr. Johnson and Miss Blackstone told the students to be careful and warned them not to climb to the top of Starved Rock. Everyone would do that together after lunch, they were reminded. For the remainder of the morning, the students were sent out to gather specimens from nature. Mr. Johnson and Miss Blackstone stayed behind. Jenifer and Jacqueline decided to disobey Mr. Johnson and climb to the top of Starved Rock. As

they marveled at the beautiful scenery, Jenifer got too near the edge and plummeted to her death.

7. Central Valley High School had a swim meet with Monsignor O'Reilley Academy. The pool was located outside and it appeared for a while that the meet would have to be canceled due to a brewing thunderstorm. Although the sky was dark the storm failed to materialize and the meet was held. Fifty yards into the backstroke race, a clap of thunder was heard. Mr. O'Toole, the coach, decided to finish the meet as there was just one race to go. As the final race began another clap of thunder was heard and it began to rain. As Mark reached for the finish line, he was struck by lightning.
8. Kenny left his seat to ask for help with a math problem. While he was gone, Jason, the class clown, placed a very sharp pencil on Kenny's seat. When Kenny returned he sat on the pencil. The next day he contracted lead poisoning.
9. It was the second day of football practice during "Hell Week" as it is referred to by the players. Most of the team was out of condition and the coach pushed each player to the limit of his endurance, "But it is so hot!" complained Bruno, a 245-pound tackle. "Shut up!" was the coach's reply. In a few minutes Bruno fell forward with a heat stroke. "He's just fainted!" exclaimed the coach, "Give'm some air." Bruno died.

Commentary Related to Discussion Questions Section C

1. The more dangerous the situation, the higher the duty of care. The danger of a situation is reflected in such matters as thoroughness of instruction to the students, thoroughness of supervision of students, hazardous nature of items being used, and age level of the students. The major question of liability for the teacher would hinge upon the nature of her instruction to the students. Two questions regarding her instruction could be raised: a) Despite the proper instruction is it possible that the teacher's performance of an advanced skill to a class of beginners could be construed as an encouragement to one of the less mature students to attempt to duplicate the teacher's demonstration? It can be argued that the verbal instructions could have become confusing and been negated by the teacher's subsequent demonstration. The age and maturity of the students would be a factor to consider; certainly high school freshmen could be expected to respond in a more immature way than high school seniors. b) A second question not revealed by the facts would focus upon whether the teacher properly instructed and positioned spotters around the trampoline. The possibility of students falling off a trampoline is so foreseeable that it is difficult to imagine a teacher who would omit her duty of positioning spotters. Failure to warn students about known or anticipated hazards and failure to take all known safety measures is generally recognized as a breach of due care. The best protection of course, is not to have or use a trampoline without extreme caution and training in its use.
2. While the absence of a teacher from a classroom can be a determining factor in a negligence suit, other elements need to be investigated. A determination of liability will focus on two concerns—the reason for the

teacher's absence and the precautions which the teacher took regarding student safety prior to leaving the room. Reasons for leaving a room can be represented on a br(ad spectrum. A teacher who leaves the room to escort an injured student to the office would generally be viewed as acting as a reasonable and prudent person. At the other end of the spectrum, a teacher who leaves the classroom to get a cup of coffee in the teacher's lounge would probably not be so viewed. Because of the desirable social and educational policy of encouraging teachers to respond to the directives of administrators, a teacher's leaving a classroom at the behest of an administrator would be viewed closer to the "class injury" end of the spectrum. Even though the teacher is justified in leaving the room, she still might be negligent if she failed to take adequate precautions to minimize the danger of risk to the students in her absence. At the bare minimum it would seem that the teacher should have made certain all students were off the trampoline and given a clear warning that no students were to be on the trampoline in her absence.

3. Mrs. Murray could be found liable. In a similar case involving a homemade knife, some boys were seated around a teacher while the one with the knife began flipping it into the ground. The action continued for quite a while until the knife hit a student's drawing board and deflected into his eye. The court indicated that there was sufficient evident from which the jury might infer that the teacher knew or should have known that the knife throwing was going on and that he was inattentive and careless. CF. *Lilienthal v. San Leandro Unified School District* 139 Cal. App. 2 d 453, 293, P. 2d 889 (1956).

Furthermore, the courts hold that while student misconduct may be the immediate cause of injury, negligent supervision can be the *proximate* cause. Such was the conclusion of *Sheehan v. St. Peter's Catholic School* 291 Minn 1, 188 M. W. 2d 868 (1971) where an injury to an eighth-grade pupil resulted from pebble-throwing that

had continued for almost 10 minutes during morning recess. In this case the court said it is not necessary to prove an accident is foreseeable. All that is required for liability is that a general danger is foreseeable and that proper supervision probably would have prevented the accident.

4. Liability would not be predicated solely upon the fact that the Pep Club was a school-sponsored organization. Fact questions to be answered would be whether the meeting of the Pep Club was known by the school advisor, or indeed by any of the school officials. It would also be important to know whether the school had a clearly expressed policy that no clubs were to meet without the knowledge and presence of the club advisor. If the school had such a rule and if the advisor or other school officials had no knowledge of a secret meeting, it would be difficult to find a legal theory upon which liability could be based.
5. Circumstances will dictate Mrs. Williams' liability. If the class was out of control and the teacher chose to ignore them to assist individual students, there is a possibility she will be found liable. However, if the atmosphere of the room was normal and the children were simply enjoying their art project, it would be more difficult to show negligence. The question would then be the length of time of the disturbance and Mrs. Williams' awareness of it. It would seem that Mrs. Williams will not be held liable according to the facts as presented. The facts, however, are sufficiently vague as to provoke discussion.
6. Field trips that are sponsored by the school require special supervisory precautions because the students are taken into unfamiliar places. The maxim here is that the greater the risk, (dispersement, terrain etc.) the greater the caution to be exercised. Mr. Johnson would likely be liable because he sent the children out unsupervised. Jennifer's death would probably not be construed to be a pure accident. Prudence should have considered more than a spelling out of the rules when

dealing with children.

7. The distinction here would seem to be between the concept of a pure accident contrasted to a foreseeable event. Given the likelihood of lightning in a thunderstorm, coaches would be well advised to withdraw students from dangers which are reasonable to foresee. An injury that would occur should the students not be removed from potential harm may well result in a successful negligence decision against the coach.
8. According to Reutter and Hamilton's *The Law and Public Education* (1973) . . . "If reasonable precautions are taken, and an intervening act not properly anticipated occurs, no negligence will exist." The teacher is not liable for the action of the class clown. According to the court, to hold the teacher liable under these circumstances "would impose a standard of care akin to the insurer." See *Swaitkowski v. Board of Education of City of Buffalo* 36 A.D. 2d 685, 319 N.Y.S. 2d 783 (1971). In this case a similar act did occur. The teacher was not held liable even though she was out of the room at the time assisting another teacher for a brief period.
9. The coach is likely liable. Care and caution must be used in the application of first aid and "give'm some air" is not its best application. In the case of *Mogabgab v. Orleans Parish School Board* 239, So 2d, 456 (La App, 1970) it was found that given proper first aid a student would not have died. Failure to summon medical aid is compounded by failure to give proper first aid for heat stroke.

Negligence

Notes

[1] Richard D. Gatti and Daniel J. Gatti. *Encyclopedic Dictionary of School Law* (West Nyack, New York: Parker Publishing Company, Inc., 1975) p. 176.

[2] Ralph D. Stern, "When Is the Principal Liable," *A Legal Memorandum*

(Reston, Virginia: National Association of Secondary School Principals, 1975) p. 1.

[3] Gatti, op. cit., p. 176.

[4] E. Edmund Reutter and Robert Hamilton. *The Law of Public Education* (Mineola, New York: The Foundation Press, Inc., 1976) p. 284.

[5] Ibid.

[6] See *Cox v. Barnes*, 469 S.W. 2d 61 (Ky., 1971)

[7] *Turner v. Caddo Parrish School Board*, 214 So. 2d 153, 156-157.

[8] *Sheehan v. St. Peter's Catholic School*, 291 Minn. 1, 188 N.S. 2d 868 (1971).

[9] *Fagan v. Summers*, 498 P. 2d 1227 (Wyo, 1972).

[10] *Titus v. Lindberg* 49 N.J. 66, 228 A. 2d 65 (1967). as noted in Reutter, op. cit., p. 287.

[11] *Lilienthal v. San Leandro Unified School District*. 139 Cal. App. 2d 743, 293 P. 2d 889 (1956).

[12] Stern, op. cit.

III
SPECIFIC TOPICS

DISCRIMINATION

The Constitutional foundation of an individual's protection against discrimination is centered in the Equal Protection Clause of the Fourteenth Amendment which states, in part, that no state shall ". . .deny to any person within its jurisdiction the equal protection of the laws." The application of constitutional standards to private education is limited by the need to establish a finding of "state action"; therefore discrimination suits against private schools would likely be based on federal and state statutes and regulations and not on the United States Constitution.

For instance, the area of race discrimination has seen several suits filed against private schools, particularly regarding the issue of whether private schools may permit a "whites only" policy in an attempt to circumvent integration mandates. In McCrary v. Runyon[1], the United States Supreme Court held that private non-sectarian commercially-operated schools are prohibited from denying admission to black students on the basis of race. The Court established its rationale on the basis of the Civil Rights Act of 1866[2] which was originally passed to provide freed slaves the right to enter into contracts. In yet another case[3] of potential race discrimination, the Fifth Circuit Court of Appeals ruled in favor of parents against a private sectarian school which had a policy excluding black students.

Some Catholic school systems (e.g. Minneapolis/St. Paul) have met the problem in a highly moral way, without legal pressure, by the issuance of policy statements which discourage and disallow attendance at the Catholic schools in order to avoid racial integration. It is of note that such stands adhering to a policy of racial equality and integration are consistent with the best sense of Christian justice and doctrine. Courts have further held that federal funds can be cut off if a private sectarian school dis-

criminates on the basis of race.[4]

Another area of concern for the future lies with potential liability of those persons involved in the actual discriminatory process. Title 42 of the U.S. Code § 1983 (termed Section 1983) provides for civil action in cases of alleged violation of civil rights and has been used by students in previous cases.[5] The statute reads as follows:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any state or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunity secured by *the constitution and the laws*, shall be liable to the party injured in the action at lawsuit in equity, or other proper proceeding for redress. (emphasis added)

To date this provision has been used with little, if any, success against Catholic Schools, given the need to establish a course of "state action." Nevertheless, arguments can be made that if private schooling is receiving enough state or federal funding for various programs, this could provide the context of "color of law" necessary to place a violating administrator within the grasp of this section.

Another key area of potential discrimination is student discrimination based on sex. Title IX of the Education Amendments of 1972 prohibits any educational program receiving federal assistance from discriminating on the basis of sex. The Title states that "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to, discrimination under any education program or activity receiving federal financial assistance. . ."

Compliance with Title IX is explained by the section on "termination of and refusal to grant or continue assistance." Title IX also contains specific exemptions for all private religious schools that should be noted carefully. It appears that discrimination in Catholic schools by sex *is* well within conformance of the law as long as the reason for such discrimination is religious in nature.[6]

There are still many open questions in this area, even given such exemptions. Concerns about whether private school sex separation or disparities in class composition, allocations, and course assignments are really based on religious tenets will need to be addressed.

Department of Health, Education and Welfare regulations of Title IX specifically address the issue of athletics[7] and specifically prohibit sex discrimination in athletics, provided there exists no religious rationale for such separation. The regulations authorize separate teams if "selection for such teams is based on competitive skill or the activity involved is a contact sport." However, where a team sport is 1) operated for one sex only; and 2) there is no team for the opposite sex; and 3) athletic opportunities have previously been limited to the exclusive sex, then anyone must be allowed to try out for the team unless the sport is a contact sport.[8] Regulations further state that equal athletic opportunities should be provided, but qualify this by stating that "unequal aggregate expenditures for members of each sex or unequal expenditures for members of each sex or unequal expenditures for male and female teams if recipient operates or sponsors separate teams will not constitute noncompliance with this section."[9]

Discrimination

Discussion Questions

1. What general steps can be developed to sensitize the school and all of its entities to the rationale and justification for avoiding sex discrimination, be it from legal mandate or from social and religious justice?
2. What can Catholic education do to prevent problems of race discrimination from occurring in our schools?

Commentary Related to Discussion Questions

1. Sex discrimination can be exceptionally harmful and demeaning in schools whether by overdrawn generalizations and stereotypes in the classroom (e.g., women shouldn't earn as much as men) or artificial conditions placed on the curriculum (e.g., industrial arts are for boys only) that are sex based without justification. The sensitization of each school lies in 1) the awareness that such practices and conditions exist; 2) an assessment of guidelines and curricula to determine whether sex-discriminatory practices are valid (some may well be; e.g., sex education classes conducted separately for boys and girls); and 3) a change of policies where sex discrimination exists that is not justified within the context of moral and religious grounds.
2. As shared in the text, some Catholic schools have met the problem of race discrimination in a broader context by the development of policies that discourage and disallow attendance in order to avoid racial integration. At the school level, officials should constantly review curriculum to assure that material is presented in a non-racist manner with full objectivity. In addition, constant attention should be given to potentially racist remarks that can often go unchallenged in both the formal and informal contexts of the school.

Notes

[1] 427 U.S. 160 (1976)
[2] 42 U.S.C. 1981
[3] Brown v. Dade Christian Schools, Inc., 556 F. 2d 310 (1977), cert. denied 434 U.S. 1063 (1978)
[4] McCrary v. Runyon, 427 U.S. 160 (1976)
[5] Many cases are involved here including the landmark case in student rights, Tinker v. Des Moines Independent School District, 393 U.S. 503
[6] § 1681 (a) (3)
[7] 45 C.F.R. § 86.41, 1976.
[8] § 86.41 (b)
[9] § 86.41 (c)

DRESS CODES

Personal appearance has never been as significant an area of student suit as speech and other alleged violations of due process. Despite the noble words of the *Tinker* court in 1968 that "students (do not) shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,"[1] there yet is lacking any definition of student substantive rights in personal appearance that approaches the firm skeletal guarantees in other areas. Even with respect to matters such as hairstyles, which have generally been thought to be protected under the First Amendment, there is by no means unanimity among the federal courts of appeal. Some federal districts have provided constitutional protection for students' hair,[2] but other districts have not been receptive to creating substantive constitutional rights for students' personal appearance.[3]

Courts during the past five years have shown a marked tendency toward sustaining rules restricting certain kinds of personal appearance. In *Ferrara v. Hendry County School Board*,[4] a student was suspended in September for the balance of the school year because he violated the clean-shaven rule. The court found that this type of personal appearance rule did not involve a fundamental constitutional liberty and thus the rule was valid as long as it was reasonably intended to accomplish a legitimate school interest. In *Mercer v. Board of Trustees*,[5] a school haircut rule easily withstood a challenge that haircut regulations for boys and not girls violated the Texas Constitutional Equal Rights Amendment. The Texas Court's rationale for its decision indicated how far courts have retreated from the student rights' heyday of the late 1960's and early 1970's:

> "Children are in a formative period of their lives wherein their values are being established by parents, church and school. All may reasonably establish rules of conduct arising out of the relationship without intervention of the courts. The schools stand somewhat *in loco parentis* to the child. Living by rules,

sometimes seemingly arbitrary ones, is the lot of children."

Again, we note that Catholic schools are not literally bound by these public law cases. Courts have not been concerned with the fairness or unfairness of a rule in Catholic schools, but they have been concerned about a student being afforded a minimum level of fair treatment before being removed from school. Even though courts do not use formal constitutional due process language, they do speak in terms of consistency and fairness.

Catholic school rules on personal appearance are generally found in an application or handbook and have a contract quality to them. The substantive fairness of school dress code rules is not a great concern of courts. Catholic schools can, and do, impose rules on their students that would be legally unacceptable in the public sector. Such rules very often specify in great detail the kind of clothes that can be worn and the way hair should be cut.

Haircut rules do not necessarily need a rational connection to a school interest such as health or safety as would be the case in public schools. Specific hair requirements are permissible in Catholic schools even if the rules go beyond health and safety. Examples such as "hair should look neatly trimmed at all times," "sideburns are to be trimmed," "to the middle of the ear," and "hair is to be tapered and cut so it is above the shirt collar in the back when the boy is seated" are acceptable. In addition, boys can be prohibited from having beards or mustaches.

There is also no requirement that hair requirements for girls be as specific as for boys. For example, even with the specific boys' requirement as just cited, the girls' requirement can be quite general: "Girls must wear appropriate hair fashions." Any degree of specificity or generality can be used in stating hair requirements because courts are not concerned about the fairness of the rule, only with fair treatment of the student. The same type of consideration applies to dress codes. Dress codes can be general (e.g., "Students must dress modestly and tastefully") or extremely detailed as illustrated below:

1. Girls should wear skirts or dresses to the knee.
2. Boots may be worn to school on cold days but cannot be worn to classes.
3. Blouses and shirts are to be worn inside skirts and trousers unless the design of the garment allows it to be worn on the outside.
4. Athletic type shirts with letters or numbers and shirts with pictures or lettering of any kind are not permissible. Blue jean jackets, white T-shirts, shirts with writing are all considered impermissible. Sweatshirts are not permitted in classes.
5. Tank tops, low scoop neck tops, and extremely sheer blouses or shirts are prohibited.
6. Students who attend school programs or activities in the evening are expected to comply with all Day School dress standards. This includes the fall play, all music concerts and graduation.

Whether a Catholic school desires to be as specific or limiting is at the discretion of the school or diocese. There is nothing illegal about imposing more stringent dress requirements on girls rather than boys, or vice versa, and uniforms can be required of one sex but not the other.

Since attendance at a Catholic school is not mandated in any state, courts presume that parents who send their children to a Catholic school are doing so voluntarily and have consented to published rules about personal appearance.

An apparent judicial lack of concern about removal from Catholic schools is not so much a recognition of the lack of "state action" as it is the fact that removal of a child from a Catholic school is not removal from the educative process; the student can still enter the public school system. The reason for the court's concern about a minimum level of procedural fairness has never been clearly expressed. But probably the reason is nothing more or less than a judicial suspicion of any arbitrary treatment that can adversely affect an individual's reputation. This latter posture is again consistent with an attitude of Christian justice.

What the courts seem to require before a Catholic school

student is expelled for personal appearance violations is that he have an opportunity to tell his side of the story. Procedural safeguards associated with the public sector such as impartial tribunal, right to counsel, right to call and cross examine witnesses are not part of the range of procedural rights for Catholic school students.

A word of caution needs to be added. Since the relationship between the parent and child on one hand and the school on the other is essentially one of contract, any procedural rights granted to students in the school literature must be afforded the student before final disciplinary action. Schools which have increased the very minimum level of fairness required by courts will have to follow their additions. For example, if the student handbook or other school literature gives a student a right to an adversary hearing at a school board meeting before he can be dismissed, then the student is entitled to that hearing as a matter of contract. Apart from a legal minimum of fairness in dismissing students, the nature of rules regarding personal appearance is virtually at the discretion of the school.

Dress Codes

Discussion Questions

1. How much do elaborate rules on personal appearance affect the development of a student's individuality?
2. Would a student ultimately be better served by general rules aimed at qualities of cleanness and neatness, instead of prohibitions of nonpermitted dress or hair cuts?
3. Student Catalpus has repeatedly showed disdain for your school's strict dress code requirements. Besides other and numerous disciplinary punishments, Catalpus has been suspended twice already in one semester. The written school policy is that after two suspensions in one semester, a student will be expelled for the balance of the school year; this policy, however, has not been enforced in at least five years. During the same semester Catalpus wears a shirt with a design of his own creation that clearly offends the school dress code and shows the administrator's head with the body of a turkey. Catalpus is promptly pulled into the office by an incensed administrator and expelled without Catalpus being allowed to say a word.

   The student handbook provides: "No student will be expelled unless he has been given an opportunity to appear at an administrative hearing and explain his side of the story. If the continued presence of the student in the building represents a threat to school safety, he may be summarily expelled but the expulsion will not become final until after the student has had an opportunity to appear at an administrative hearing, in which case one must be held within 48 hours of his summary dismissal." Catalpus has sought legal counsel and threatens legal action to be reinstated. Does Catalpus have any legal grounds for reinstatement? If so, what action might the administrator take to eliminate Catalpus' complaints?

Dress Codes

Commentary related to discussion questions

1. It is doubtful whether a student would suffer any appreciable harm from having to conform to a dress code with which he disagrees. Since the choice of a nonpublic school is a predominantly parental decision at the lower grades and a joint parent-student decision in the secondary, the objectionable nature of some features of a dress code is somewhat mollified in the junior high and senior high years by an element of choice in the selection of a school. A child's personality is primarily influenced by contacts within the home and the limits of its development appear to have been determined by the early elementary years.

   The question does raise some concerns about unnecessary rigidity in dress codes. It should be apparent that school dress codes do not change a person's dress habits. A prohibition of blue jeans at school does not mean that the student will not wear blue jeans off the school premises. Conformity to a dress code does not mean agreement, and it certainly does not represent a changed life style for the student. To the extent that dress codes represent a particular level of propriety for a school image, any inhibitions on student preference in dress is probably defensible.
2. It may well be that school expectations of appearance principles such as cleanliness and neatness may better serve the students. With such an approach, schools could involve their students in a determination of relevant principles, the definition of such principles, and finally an application of the principles to student life.
3. The question raises issues of procedural due process (fair treatment). It may be well to first eliminate from consideration factual items that would not represent legal problems based upon the present status of the law:
   a. The conditions or prerequisites for expulsion (e.g. the third suspension in the question) would not be a concern of the courts.

b. The dress code prohibiting the wearing of certain kinds of shirts would not be a problem.

Catalpus has possible causes of action for breach of contract and a possible cause of action for defamation. Since both the constitutional and contractual causes of action focus on the same issues, they will be discussed together. Although there may well be a minimum constitutional requirement of an administrative-type hearing in non-public schools, such a concern is moot here because an administrative hearing was guaranteed in the student handbook. Some may question whether information in handbooks, brochures, applications are part of a contract between the parents and the school. It would seem that they are part of a contract, especially since such formal contracts as do exist (usually dealing with finances and discipline) are not negotiated and also since the purpose of such handbooks is to present an accurate picture of the school and encourage enrollment of children. If the handbook provision concerning an administrative hearing is part of a contract, then the school is obligated to follow its provisions. The spirit of the provision seems to be directed against the embarrassment of a hasty expulsion.

Implicit in the handbook provision is notice of the rule violated, an opportunity for the student to explain his position, and an administrative investigation of any explanations that might exonerate the student. The provision does not require the right to have an attorney present, an independent tribunal, presentment of witnesses, confrontation and cross-examination of the school's witnesses. Catalpus is clearly entitled to an administrative hearing, but other interesting subsidiary questions are raised. Is Catalpus entitled to an administrative hearing before an administrator other than the one who expelled him? Probably not. Could Catalpus challenge the right of the school to expel him at all since the three-suspension rule had not been enforced in five years? Again probably not, al-

though Catalpus might have a Civil Rights Act complaint if he were a member of a protected suspect class such as race, and he could prove that the enforcement of the rule after five years was related to his protected status.

Could Catalpus sue for damages? Possibly, but his chances of recovering substantial damages are negligible. Failure of a non-public school to follow contractual procedures may well support an action for defamation although a student would be hard pressed to prove damages. But even if Catalpus collected only $1 nominal damages, the court may require the school to pay Catalpus' attorney's fees which could be hundreds and possibly thousands of dollars.

The administrator's course of action should be to contact Catalpus and offer to hold an administrative hearing for him. The administrator should set a time in his offer, possibly during school time, so that he does not have to wait for Catalpus to respond. The offer would best be made both verbally and in writing and should be sent by certified mail with return receipt requested. At the appointed time for the hearing Catalpus will probably bring his attorney, but the administrator must stand by the contract provision and refuse participation by the attorney. The hearing should be tape-recorded with all parties aware of such procedure.

Dress Codes

Notes

[1]Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 506.

[2]First (Richards v. Thruston, 424 F. 2d 1981 (1970), Second (Owen v. Barry, 482 F. 2d 1126 (1973), Third (Zeller v. Donegal School District Board of Education, 517 F. 2d 600 (1975), Seventh (Holsapple v. Woods, 500 F. 2d 49 (1974), and Eighth (Bishops v. Colaw, 450 F. 2d 1069 (1971).

[3]District of Columbia (Fagan v. National Cash Register Co., 481 F. 2d 1115 (1972), Fifth (Karr v. Schmidt, 460 F. 2d. 609 (1972), Sixth (Gfell v. Rickelman, 441 F. 2d 444 (1971), Ninth (Oeff v. East Side Union

High School, 404 U.S. 1042 (1972), and Tenth (Hatch v. Goerke, 502 F. 2d 1189 (1974).

[4]Ferrara v. Hendry County School Board, 363 So. 2nd 371 (1978).

[5]Mercer v. Board of Trustees, 538 S.W. 2d 201 (ct. of Civ. App. Tex., 1976).

LAW ENFORCEMENT IN THE SCHOOL

Sometimes school officials either willingly or unwillingly find themselves involved with the police. For example, drugs, violence, and extortion have been problems in some urban and rural schools. The Catholic schools have not been immune. How should Catholic school authorities react to the possibility of police involvement? Some argue that police should enter schools only under the most dire of circumstances (e.g. bomb threats, extreme violence). Others contend that if there is a clear or even suspected violation of the law, the police should be involved.

The relationship of student to school authority has been compared with that of student to parent. The school official stands in place of the parent, or in legal terminology, *in loco parentis*. From early cases the ". . . courts have held that in schools, as in the family, there exists on the part of the pupils, the obligation of obedience to lawful commands, respect for the rights of others, and fidelity to duty."[1] Thus the school authority's power was thought to be the same as the parent's. If the parent could involve the police, so also could the school.

Some would argue that the *in loco parentis* concept has withered, if not died, over the last several decades. The debate over whether "in loco parentis" is a viable model for the education community continues even today. *Tinker v. Des Moines Independent Community School District*[2] held that the summary dismissal of public high school students for wearing black arm bands to protest the Vietnam War had violated their due process rights. In explaining the reasons for this, the court said, "In our system, state operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students." Of course, Catholic schools are not public schools (constitutional due process does not necessarily apply; see Chapter 1), but the comments should be taken to

heart. "Students do not shed their constitutional rights . . . at the school house gate." *Tinker, supra.*

In what areas might the school, the student, and the police intersect in the Catholic schools?

A. *Compulsory Education*

All states but Mississippi require attendance. (Usually the ages are 7-16; e.g. Minnesota Statutes § 120.10). If parents do not send their child to school, most states impose a criminal sanction on the parents. So, if a child is registered in the Catholic school but does not attend, the law of most states requires the Catholic school official to notify the authorities (in some cases the public school superintendent of the area, in other cases, the local prosecuting attorney).

B. *Search and Seizure* (e.g. lockers, persons, dorm rooms)

This is a very confused area of the law, not just for Catholic schools, but also for public schools. Suppose you wish to retain the right to inspect student lockers. What are your rights or obligations as a Catholic school official? Generally, two views have been taken by the courts in public school cases. Some courts have applied an administrative view: "Not only have the school authorities a right to inspect (the student's locker, without a warrant) but this right becomes a duty when suspicion arises that something of an illegal nature may be secreted there."[3] Another court has stated, "We believe this right of inspection (of lockers without a warrant) is inherent in the authority vested in school administrators and that the same must be retained and exercised in the management of our schools if their educational functions are to be maintained and the welfare of the student bodies preserved."[4] This in essence is the "in loco parentis model."

However some courts take the Criminal Law view: "Searches conducted outside the judicial process are per se unreasonable," said the U.S. Supreme Court

in *Collidge v. New Hampshire.*[5] Applying this principle of law, together with the *Tinker* principle (i.e., students do not shed constitutional rights at the school house gate), some courts say the 4th Amendment (which prevents unreasonable searches and seizures) is violated by such searches.

Some Catholic schools have chosen to follow the Administrative view. Others have adhered to the Criminal view. Until a court in your area answers the question, or until the U.S. Supreme Court finally resolves the dilemma, it seems permissible to follow either view. (see major section, "Search and Seizure.")

While the principal has the right to search a student's locker, he/she might wish to inform the student of such a right through a consent form, indicating that searches might occur. The student and parent might sign a Consent Form such as the one below.

CONSENT FORM

I, John Jones, agree to permit inspection of (dorm room #, locker #) at any time by the principal or any designee for purposes of health, safety, and welfare of myself and my fellow students. I hereby consent to such inspection and agree that use of the (dorm or locker) is conditioned by my consent. I, Mrs. Jones, the parent of John Jones, consent to such an inspection.

_____

John Jones

_____

Mrs. Jones

C. *Interrogation of students.*

Another problem for Catholic school officials is police questioning of children in school during class hours. Many school officials, both public and private, view this as improper. They reason that school is

designed for educational purposes and not for police and investigatory purposes. If the police have probable cause to arrest the student, then, of course, the school official has no authority to prevent this, even if it takes place within the building. However, interrogation is a different matter and involves some very sensitive issues. Some suggestions in dealing with a situation of such gravity include the following:

1. Involve police only when there appears to be immediate danger to the health, safety or welfare of the involved student, the other students, or the faculty.
2. If police do enter the school to arrest a student, insist on an arrest warrant and contact the parent.
3. Do not allow the police to interrogate the student during school hours or on the school premises. Stay with the student. Contact the parent.
4. If you wish to cooperate with the police, contact your school's attorney immediately to find out the nature and extent of the cooperation you should give. If your school does not have an attorney, contact the superintendent of your arch/diocese and seek advice.

Law Enforcement in the School

Discussion Questions

1. Do Catholic School officials stand *in loco parentis* (in place of the parent) during the defined school day?
2. What are some of the advantages and disadvantages of involving the police with the Catholic Schools?
3. May school officials require students to submit to questioning by police officers? What are the ramifications?

Law Enforcement in the School

Commentary related to discussion questions

1. The doctrine of "in loco parentis" (in place of the parent) was a foundational doctrine in education. Courts from early times gave whatever powers a parent possessed to the teachers and administrator during the school hours. Some argue the doctrine has eroded since the development of the students' rights cases of the 1960's and early '70s. Others contend the doctrine is still a viable doctrine even in the public schools. Certainly in the Catholic school setting, the parent has most often chosen to send the child to that school because of the moral and educational underpinnings of the school. One of the historical reasons for sending a child to a Catholic school has been "better discipline." It may be possible that the professional Catholic school educator, rather than being in place of the parents, can perform tasks which a parent would not be professionally competent to do. Therefore your school may wish to incorporate in its policy statement your understanding of "discipline."
2. *Pros*
   1. A closer working relationship between school officials and police authorities;
   2. A better understanding by the students of the role of police officers;
   3. Protection for the Catholic school;
   4. Safer environment.

   Cons
   1. A mixing of the role of educator with the role of police authority;
   2. Potential lack of trust of school authorities by students;
   3. Development of an adversarial rather than a working relationship with the students;
   4. Development of an attitude of fear rather than an attitude of trust.
3. A student has a constitutional right to remain silent.

The student should cooperate to the extent of giving his name and address. However, what the student says may be used against him. School officials may not require a student to submit to questioning by police officers. In fact, both the student and the school official should contact the parent or a lawyer before allowing police to question a student in the school.

Law Enforcement in the School

Notes

[2]Tonton v. McKenny, 226 Mich. 245, 197 N.W. 510 (1924).
[3]393 U.S. 503 (1969).
[4]People v. Overton, 301 N.Y.S. 2d 479, 249 N.E.2d 366 (1969).
[5]State v. Stein, 203 Kan. 638, 456 P.2d 1 (1969).
[6]403 U.S. 43 (1971).

RESTRAINT AND CORPORAL PUNISHMENT

Few issues in student rights carry the emotional and philosophic volatility as that of the use of physical force in dealing with students. The use of such physical force is generally described in one of two broad areas: restraint/correction of students and corporal punishment.

Restraint/Correction of Students

School administrators, teachers, and students all desire to exist in a school setting where pupils can perform to their maximum capability in optimum learning conditions. When situations call for the use of physical force to prevent harm to a student or to others threatened by the student (restraint), teachers and administrators have a duty mandated by statute or common law in each state to protect students from harming themselves and others.

Some states like Minnesota have codified the use of reasonable force to encourage the exercise of that duty: "Reasonable force may be used upon or toward the person of another . . . when used by a parent, guardian or teacher . . . in the exercise of lawful authority, to restrain or correct such child or pupil." Even without such statutory support, courts have been very willing to allow school officials the right to use reasonable force to restrain or correct students.

It should be understood that physical force can be used in self-defense. The amount of force varies depending upon the age of the pupil, the nature of the attacker's action necessitating defense, and the action of the one attacked after the attack has ceased. In a violent age when students may be using weapons that are life-threatening, the general rule is that defensive force may be used commensurate with the force of the attacker. Some states may still require that a person attacked with a dangerous weapon must retreat before retaliating with dangerous force of his own. Certainly this is an advisable rule when the possibility for retreat exists. For administrator or teachers who have a dangerous student in the school building, retreat is neither

advisable nor desirable. The possible harm to other pupils or faculty members necessitates that the student be restrained. In order to justify the use of force on the ground of self-defense, it is not required to show that the use of force was necessary to protect from imminent personal injury. It is sufficient if the necessity was real or apparent. But the mere belief of the person attacked is not sufficient to justify the use of force. The facts at the time must reasonably justify the use of force. Once the attacker is disarmed, the reasonable justification for self-defense is gone and school officials must beware that they do not become the aggressor.[1] The student, however, may be physically held to conduct him to the office. Injuries to a student aggressor, after he has been disarmed, resulting from resistance to attempts to hold or restrain him are not likely to be the liability of the school personnel.

Similarly, physical contact with students in attempting to separate a fight between students has occasionally resulted in injuries to one of the students. Again the key to non-liability to school personnel is one of reasonableness. It is reasonable for school personnel to physically separate students by holding them or even physically pushing them apart. It is not reasonable to become an aggressor toward one of the fighting students. The old common law rule in situations where one acts in defense of another is that the person coming to the defense of another steps into the shoes of the person he is assisting.[2] As long as school personnel address themselves to physically separating fighting students and not championing the cause of one of the antagonists, there would likely be no legal liability for injuries.

Physical contact by school personnel toward students may be necessary to remove unruly students from a classroom. In a leading and interesting case that addresses a number of legal issues, a teacher was found not guilty of assault and battery even though he did not follow the school board rule on corporal punishment. In *Andreozzi v. Rubano*[3], a student was causing a disturbance in a detention room when the teacher attempted to lead the

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student by the arm out of the room. In the hall the student clenched his fists, displayed a belligerent attitude, and made a vulgar remark to the teacher. The teacher then slapped the student across the face with his hand. Despite a school board rule requiring that corporal punishment be administered by only the principal, the criminal court judge found that the teacher was acting to restore order and discipline, so what happened was not punishment; therefore, the school board rule was inapplicable. If the court's reasoning appears weak, it nonetheless is consistent with most other courts that defend the use of reasonable physical means of correction even if violative of school board policy.[4]

Corporal Punishment

When the scene changes from physical force in the restraint or correction of students in the classroom to the use of corporal punishment usually administered in the school office by an administrator, the scenario becomes much more dramatic. Corporal punishment in its broadest sense includes any physical contact between school personnel and students and may well include the provision of restraint as stated above. More likely, however, it is understood as a narrower disciplinary procedure of physical punishment (spanking) for an allegedly unacceptable act of behavior.

In December, 1973, a sixth grade boy was given two swats in the presence of a second teacher and in view of other students despite the mother's prior notification to the school that the child was not to be spanked. A federal district court in North Carolina upheld the right of a public school to spank a child even over parental objections, partly because of a North Carolina statute permitted "reasonable force in the exercise of lawful authority."[5] The federal district court also held that spanking a child without parental permission did not violate due process, the reason being that parental patterns of child-rearing are not fundamental constitutional rights. But the Baker court did hold that even though the parent has no protectable right in child-rearing, a child has a protected right in not

being spanked. Five procedural requirements were expressly to be followed before corporal punishment could be used:

(1) Notice by the school that specific conduct may result in corporal punishment;
(2) Independent investigation of the facts by the administrator if the student denies guilt;
(3) Exhaustion of alternative means of altering behavior;
(4) Presence of second teacher or administrator who is told reason for spanking;
(5) Furnishing upon request to parents a written explanation of the reason for corporal punishment and the name of the second school official present.

It is important to note that the constitutional protections for students enumerated in *Baker v. Owen* and required by the Fourteenth Amendment do not extend to private or Catholic schools since they are not state controlled. Nonetheless, nothing would prevent a state legislature or state department of education from making these requirements applicable to all schools in a state, public and private, as has been done, for example, in New Jersey.

The most aggressive attack upon the use of corporal punishment occurred fairly recently in *Ingraham v. Wright*[6] where corporal punishment as administered in Dade County, Florida, was claimed to be "cruel and unusual punishment," violative of the Eighth Amendment. By any definition the punishment was excessive, with some students receiving 20 to 50 swats, some of which produced severe bruises and welts. Nonetheless, the U.S. Supreme Court held that even such excessive punishment is not unconstitutional. Students who are victims of such excessive punishment can use the available civil and criminal remedies, which means suing for damages or signing a criminal complaint. The court also held that students were not entitled to procedural rights before being spanked as the Baker Court had declared.

At this point the article has come full circle because, with the constitutional argument disposed of, the use of physical force again depends solely upon reasonableness. The

legal tests of reasonableness in the use of physical force of any variety traditionally have been:
(1) Motive of the person applying force;
(2) Harm to the one receiving the force;
(3) Size of the student;
(4) Instrument used.

It is probably safe to state that the most effective barometer of the reasonableness of physical force is the mark left on the one upon whom the force is applied. Thus it is not unusual to find a criminal conviction for battery or child abuse where ten or fewer swats are administered calmly by a teacher or administrator using a fairly typical paddle—the reason for conviction being the evidence of bruises left from the spanking.[7] In Catholic schools where the use of corporal punishment is often justified on the basis of delegation of authority in an application or a separate consent slip, it is well to remember that parents cannot consent to an unreasonable amount of physical punishment toward their children. The safest protections from successful lawsuits or criminal charges are reasonable parameters in administering corporal punishment:
(1) No more than three swats;
(2) Have a witness;
(3) Investigate any denial of guilt;
(4) Designate only one person to administer the punishment.

Schools will still be left with the problem of the use of physical force to restrain students or correct them in spontaneous classroom settings but courts have tended to be very protective of school personnel in such situations.

Restraint and Corporal Punishment

Discussion Questions

(1) Even though corporal punishment is not unconstitutional, does the use of such punishment serve to accent, rather than de-emphasize, violent behavior?

(2) Since Catholic schools rely so strongly upon the parental delegation of authority to discipline, should the use of corporal punishment be left with parents?

(3) Student Jones complains to administrator Smith that student Johnson has just hit him (Jones) in the stomach. Johnson has a reputation as a school bully. Smith promptly goes to Johnson's classroom and, without saying anything to Johnson, grabs him by the shirt collar and physically moves him toward the door. Johnson strikes the door frame, then falls and strikes his head against the tile floor. As Johnson stands he clenches his fists and glares at Smith who physically slaps him across the face. By the time Johnson arrives at the office he has received bruises on his arm and head with other potential injuries. Were Smith's discipline procedures justifiable? How might Smith have acted differently?

Commentary Related to Discussion Questions

1. Dr. Kerby Aloy, a consultant on child mental health, has highlighted the tightening circle of abuse resulting from a school's use of corporal punishment: "Children who are being abused at home are more likely to have learning problems at school . . . and, therefore, they are more likely to be candidates for corporal punishment. These children do not need the school also to teach them that violence is the way to solve problems and to prepare them for adulthood. They need to see that other adults are more creative and more caring." In 1968 George J. Luckey, in his first report as Superintendent of the Common Schools of Pittsburgh, wrote: "We have found that corporal punishment degrades a child in his own estimation. He loses his self-respect, and . . . he loses his respect for his teacher. . . Not only is the old method of corporal punishment barbarous, but it also infuses an unsubordinate spirit into the whole school."
2. The purported contract between parents and the school to allow the use of corporal punishment can more properly be labeled a misnomer and fiction since school discipline policies are offered only on a take-it-or-leave-it basis. Such a difficult decision is normally within the power of the school and should be made within the context of potential harm, both attitudinal and physical, that may occur.
3. This question raises issues of reasonable physical force. This type of incident can unfortunately occur. Smith appears to have failed miserably on the tests of reasonableness. His motive in grabbing Johnson initially is unascertainable from the facts, but the facts certainly suggest anger and possibly even antagonism. Smith almost seems to be acting out the both spoken and unspoken frustrations of administrators in dealing with the classic school bully: "I'm really going to take care

of that troublemaker now." Despite what Smith may express was his motive, a jury would imply a motive from Smith's actions and the conclusion would be most unfavorable to Smith. The most condemning test of reasonableness is always the harm produced. An administrator has less responsibility for student injuries if the administrator is defending himself from the student. It is doubtful that Johnson's clenched fists and glare constituted an aggressive act justifying a blow to the face; but even if they did, some of the injuries certainly occurred even before these alleged aggressive acts. The size of the student can justify greater use of physical force assuming that the student's size was part of the aggressive behavior toward the administrator. The administrator's propelling of Johnson from the room certainly suggests a size differential in favor of Smith. Fortunately courts have never adopted what may be termed the pedogogical progeny of the Wild West's law of the gunslinger: "Hit first and ask questions later." It is certainly not to Smith's credit that he used only his fists rather than a baseball bat or other instrument; the critical concern is whether he needed to use any means of physical contact at all. On all counts, Smith's actions appear to be unjustifiable. Johnson was entitled to a presentation of his position before any punishment was administered. This opportunity for explanation could occur in the hall outside the classroom or in the office, but it must occur.

Restraint and Corporal Punishment

Notes

[1]Germolus v. Sausser, 85 N.W. 946 (Minn., 1901)
[2]See Minnesota v. Herdina, 25 Minn. 161 (1878)
[3]141 A. 2nd 639 (1958)
[4]See also Streeter v. Hundley, 580 S.W. 2nd 283 (Mo., 1979)
[5]Baker v. Owen, 395 F. Supp. 294 (MDC, 1975), *aff'd without opinion* 423 U.S. 907 (1975)
[6]430 U.S. 651 (1977)
[7]People v. Ball, 58 Ill. 2nd 36, 317 N.E. 2nd (1974)

"A real sickie—absent, truant, stubborn and very dull. Is verbal only about outside, irrelevant facts. Can barely read (which was huge accomplishment to get this far). Have fun."

"A secretary at a private tutoring agency calls a public junior high school to inquire about a child's reading level. The principal opens the child's record and gratuitously informs the unforeseen caller that the child has a history of bedwetting, his mother is an alcoholic, and a different man sleeps at the home every night . . ."[1]

In 1969 a study conducted by the Russell Sage Foundation found that information was being collected in student cumulative folders without any informed consent; that information collected for one purpose was subsequently used for another purpose; that there was no way to challenge any accuracy in the data, no way to destroy outdated data, and no procedure for restricting access to the data. These findings, specific and unethical abuses of cumulative folders as noted above, and a number of other concerns not focused necessarily on the school provided a great deal of impetus for the development of the Family Educational Rights and Privacy Act of 1974 (also called the Buckley Amendment).[2] The Act governs any school which receives federal assistance administered by the Department of Education and it should be acknowledged that the clear majority of Catholic schools do not fall under this classification and are likely not encumbered by the Act except by desire. In this Act . . . "federally aided private schools, regardless of state action, are bound to observe the *privacy and maintenance conditions* of the statute. Similar controls to protect student privacy may be imposed by state statutes."[3]

The major purpose of this act is to provide parental access to and confidentiality of records. A major reason for

parental access is to assure data accuracy. Accurate maintenance of these records should be a priority for all schools.

The law provides that no federal funds administered by the Department of Education are available to any educational institution both public and private that denies parents of a student, or the student him/her self if over 18, the right to "inspect and review any and all official records, files, and data directly related to" the student. This includes "all material that is incorporated into each student's cumulative record folder . . . specifically including, but not necessarily limited to, identifying data, academic work completed, level of achievement, attendance data, scores on standardized intelligence, aptitude and psychological tests, and interest inventories." Further included are "health data, family background information, teacher or counselor ratings and observations, and verified reports of serious or recurrent behavioral patterns."

It is also clear that the law places restrictions on the right of third parties (e.g., employers, police officials, military) to review student records without permission of the parents of the student, unless the student is 18 and can grant his/her own permission. Not only can the record not be reviewed without permission, no portion of the record can be *released* or sent to any outside agency or person without *prior, written* consent of the parent or the student where the student has reached the age of 18 or is in an institution of higher learning. However, teachers and administrators in the school attended by the student who establish a "legitimate interest" may gain access to student information without parental permission.[4]

The Department of Health, Education and Welfare issued regulations to implement the act[5] which essentially provided parents and 18-year-olds the right to inspect and challenge the accuracy of the records. Legal implications become quite clear when one considers the potential of defamatory statements such as those noted at the beginning of this section.

The best advice for teachers and administrators is to record only objective and factual data in the student's

cumulative folder. Examples such as "absent 14 days in the first semester," "had two fist fights the week of February 2" are better than saying that a student is "a problem" or "very fiesty." The rationale for placing objective and factual data in the student cumulative record is that opinionated data is open to question and, in fact, may be defamatory. Even if the data is read only by authorized personnel, it can still be defamatory.

Authorized personnel should be able and allowed to come to their own conclusions based upon factual data. While truth is a defense to defamation, it would be unwise to ask for trouble. Further the law permits the removal of data from the record which is potentially defamatory. Thus, students' records should be subject to continuous examination and scrutiny by authorized school officials to search for out-dated, irrelevant, potentially defamatory, and inaccurate data. The law does allow the purge of such material. Purging literally means removing information from a folder or crossing out the data so the information cannot be read.

There does remain some question about whether, in the absence of a governing statute, there is a contractual duty to keep student information confidential.[6] Concerns for privacy and confidentiality should be part of Catholic education, regardless of statutory mandate. Judicial cases have not yet developed to answer questions in this area, but justice and fairness seem to demand such a stand, regardless of the legal interpretation.

School Records

Discussion Questions

1. What objections might school officials have to parental access to a student's school records?
2. What effect might access to records have on the willingness of school teachers and psychologists to communicate information concerning the child?
3. What kinds of lawsuits can a Catholic school face in relation to school records?
4. Do parents have a right to see a student's school records?

Commentary Related to Discussion Questions

1. School officials, including individual teachers who have recorded data and remarks in the student's cumulative file, might object on the basis of purpose. The most common objection is that the purpose of recording the remarks was to transmit information to the student's next teacher so that the teacher may be prepared for the student's educational problems. Some educators fear that parents may use the information unwisely; e.g., brag about a child's IQ or "use" the IQ score to insist that the child should pursue a certain career. Obviously, it is upsetting to teachers and school administrators to open records to the parents when the purpose was to relay information to other teachers. The Buckley amendment has recognized this problem and has given the opportunity for school officials to purge the record.
2. Some have argued that the doctrine of "privilege" should apply. That is, only authorized personnel should have the right to review the records. Obviously, however, the Buckley amendment has not accepted this argument and has given the right of review to the parent and the adult student. As suggested in the main text, rather than recording interpretive information which can be misinterpreted, it is best to record factual data and permit a psychologist or teacher to interpret the data.
3. Some types of legal involvements in relation to school records can include (1) defamation if the information in the record is false; (2) invasion of privacy for releasing information to unauthorized third parties; (3) infliction of mental distress; for example, a psychologist filed a report calling a child "a high grade moron"—see *Iverson v. Grandsen* 237 F. 2d 898 (10th Cir. 1956); (4) a court order to expunge illegal or inaccurate records; (5) a court order enjoining dissemination of adverse student records.
4. Under the Family Educational and Privacy Act of 1974, parents do have the right to inspect and review all the

child's school records where the school receives funding from Department of Education. In fact the school must establish a procedure for complying with the request to see the student records and may take no longer than forty-five days to grant the request.

School Records

Notes

[1]Divoky, "Cumulative Records: Assault on Privacy". *Learning Magazine*, September, 1973, p. 21.
[2]20 U.S.C. Section 1232.
[3]William Valente, *Law in the Schools* (Columbus, Ohio: Charles E. Merrill Publishing Co., 1980) p. 469.
[4]H. C. Huggins and Richard S. Vacca. *Law and Education: Contemporary Issues and Court Decisions* (Charlottaville, W. Virginia: Michie Co., 1979), p. 307.
[5]45 Code Fed. Reg. 99.1 et seq.
[6]Valente, op. cit., p. 469.

SEARCH AND SEIZURE

Probably no other area of school law has generated as much recent controversy as search and seizure. The Fourth Amendment to the U.S. Constitution guarantees, "The Right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause." Undergirding the Fourth Amendment is a compelling social policy to create a right of privacy for persons and their property against government intrusion unless the government can meet certain requirements justifying such an intrusion. As a person leaves the privacy of his/her own residence and travels in more public settings for work or recreation, it becomes more difficult to balance privacy against the necessity for intrusion upon one's person or property in a search. The need to protect the lives of law enforcement officers, to facilitate crime investigations and to prevent crime has caused courts to take a more flexible approach to balancing the interests of privacy versus the necessity of a search. One such public setting is the school. The difficult balancing problem for courts is a determination as to what degree of privacy students are entitled while they are in a place which they are compelled to attend.

There is one critical difference between public and parochial schools in the matter of student searches. The Fourth Amendment by virtue of its interpretation and application through the Fourteenth Amendment requires "state action" and Catholic schools are not state agents involved in "state action." The considerable body of search and seizure law that has developed for the public schools is inapplicable to Catholic schools. Courts have fairly consistently held that the "probable cause" standard for searches is inapplicable to student searches and only "reasonable suspicion" is required.[1] But even this lesser standard does not apply to parochial schools. "Reasonable suspicion" is a minimal judicial protection against arbitrary searches that are not conducted pursuant to a

complaint of wrongdoing.[2] Considering that there is a potential for greater harm in a crowded school if tips and rumors concerning drugs, dangerous weapons, etc. are not investigated immediately, judicial relaxation of "probable cause" is a recognition of the need to protect students, most of whom are minors. And yet the public school student is protected from indiscriminate or selective searches that could be conducted to discover evidence of a non-reported wrongdoing. Public school officials cannot search individual student lockers any time they wish.

The inapplicability of the Fourth Amendment permits Catholic school officials to be arbitrary in locker searches. Unless otherwise indicated in a contract or handbook, Catholic school officials may enter a student's locker at any time to search for contraband. Such searches can be unannounced and selective, and they can be done even if there has been no report of wrongdoing. It is not unusual for a Catholic school to have a provision in the school handbook prohibiting the possession on school property of such items as non-prescription drugs, dangerous weapons, alcoholic beverages, pornographic literature, as well as other items. Once contraband is found, not only can the Catholic school student be disciplined, but the evidence violating a state law would be admissible in a criminal action without judicial scrutiny as to the reason for the search. In a Catholic school, there does not legally have to be a reason for a locker search.

However, the provision by the school for student lockers would appear to make the school a bailee of the student's locker contents. If, during the course of a locker search, a student's property is damaged or missing through an absence of ordinary care by the school, the school would be liable to make restitution. For example, if a student's locker is searched in the absence of the student and the locker is not properly locked again, resulting in the theft of a valuable coat, the Catholic school officials would have breached a duty of ordinary care and would be liable to replace the coat.

Seizure of property from a student's person or locker

raises questions of what ultimate disposition is to be made of the property. Essentially, seized property will fall into two categories: (1) property that is impermissible because it is illegal to possess; e.g., non-prescription drugs, dangerous weapons, and (2) property that is impermissible because it violates only a school rule; e.g., radios, certain kinds of toys, or skateboards. Items in the first category should be turned over to law enforcement authorities and are not returnable. Items in the second category might be retainable by the school since their presence violates a published rule and such rules are part of the contract between the school and the home. However, since the contractual relationship between the school and home terminates at the end of the school year, it would be advisable to return all seized items in the second category to the student or the parent no later than end of the school year.

Searches of a student's person are more complex. The social policy protecting right to privacy becomes stronger as a search moves from lockers to the person him/herself. Even though Catholic schools do not operate with constitutional restraints, they are not immunized from civil law suits. Two possible tort causes of action would be assault and battery and invasion of privacy. Battery is the unlawful touching of another person. Assault is the reasonable expectation of a battery. Invasion of privacy essentially involves an unreasonable and unwarranted intrusion into the private affairs of another or of publicly disclosing private facts.

Whether a tort has been committed depends upon the legal justification for the search. Even though a Catholic school is not required by the constitution to give a reason for a search, the reason for a search (or the absence thereof) would be an issue in a tort suit. Forcible search of a student's person should have at least "reasonable suspicion" whether or not contraband was found. A student who voluntarily acquiesces in an administrative request to empty pockets or purse probably has no tort cause of action. The more intrusive the search of the person, the greater the potential liability. The most volatile aspect of student searches is the strip search. One female student

recovered $7500 damages for invasion of her privacy because a strip search was conducted on the basis of inadequate evidence.[3] The use of "canine sniffers" to aid in student searches has met with a mixed reaction being upheld in one federal district[4] and invalidated in another[5].

Search and seizure cases involving Catholic schools do not appear to have been reported, probably because of the inapplicability of the Fourteenth Amendment. Similarly, tort suits against Catholic schools generated by student searches do not appear to have been reported, but the general principles of tort law applicable to public schools would apply equally to Catholic schools. Searches of students will have to be conducted according to the "reasonable person" doctrine test of tort law; that test includes not only the manner of search, but the justification for the search in the first place.

Search and Seizure

Discussion Questions

1. Considering the fact that a student search over the student's protestations is really a negation of trust in that student, should Catholic schools limit such intrusions into a student's personal life only where there is evidence close to probable cause?
2. If Catholic schools desire to instruct students to respect the property of another, should locker searches ever be conducted without the student being present?
3. A female student who has never been in any trouble in class one day hurriedly stuffs something into her blouse as you walk into the classroom. When asked what she is trying to hide, her response is, "Wouldn't you like to know?" What should your course of action be? Would your decision be any different if this girl had been caught on several previous occasions with marijuana in her possession? Would you act any differently if another student informs you just before you enter the classroom that a wrist-watch is missing from her purse?

Commentary Related to Discussion Questions

1. The trust factor between a school official and a student is not so much a factor of a request for a search, but the reason behind the request. An explanation of the reason for a student search most often results in voluntary student cooperation. This eliminates confrontation with a student who avows he has done nothing wrong and refuses to permit a search and then must either be forcibly searched or removed from school for insubordination. Trust is based upon respect, and respect is earned by a fair attitude toward students. It is not necessary to reveal the names of informants, but it is fundamental fairness to express the reason for the search.
2. Students must understand that a school locker is not their private property and that it would be unrealistic to expect the same kind of privacy in a school locker that they would have in a locked closet at home. The very purpose of the school locker is to provide some protection for the student's personal items. Protection of his personal possessions, however, is not to be equated with immunity from accountability to school officials for the locker's contents. There is nothing wrong with a policy of trying to have the student present when the locker is opened, but there will be times when the student's presence is impossible (e.g., illness, weekends) or raises the possibility of the student creating a disruption before other students. Having the student present at a locker search certainly prevents a later confrontation with irate parents about why lockers are being secretly searched.
3. If the student ordinarily follows school regulations, the teacher would be wise to assume that she was merely hiding a personal item. Choosing to respect her privacy or even to answer in a light manner to her fast response would avoid a confrontation over some item that may prove to be embarrassing rather than illegal.

If the student had been caught previously with illegal substances or if a small item had been reported missing, it would be more reasonable for the teacher to insist that the student identify the hidden item. The facts would seem sufficient to justify a request of cooperation from the student, and a refusal by the student may well permit more severe disciplinary measures.

From a constitutional perspective, it is irrelevant whether the girl's conduct is sufficient to warrant "reasonable suspicion." Certainly the negative response of the girl toward a search and the place of the search raise potential tort concerns. To conduct a forcible search would almost invite a lawsuit whether or not marijuana or stolen goods were found. Perhaps the only solution, and it is far from desirable, would be to threaten some disciplinary measure on the basis of insubordination. A private conversation would be preferred to a public scene; if the teacher and administrator believe the incident must be pursued, perhaps the girl could be retained in the office until her parents arrive to persuade the girl to cooperate.

Search and Seizure

Notes

[1] See In the Interest of L.L. v. Circuit Court of Washington County, 280 N.W. 2nd, 343 (Wis. 1979)

[2] The difference between "probable cause" and "reasonable suspicion" can be explained through illustration. Probable cause requires information from a reliable informant before a search is legal; a reliable informant is one who has furnished correct information in the past. "Reasonable suspicion" is a much lesser standard and includes the anonymous tips or rumors that come to the ears of an administrator.

[3] See NOLPE Notes, Vol. 14, No. 7, p. 3 (July, 1979)

[4] Doe v. Renfrow, 475 F. Supp. 1012 (N.D. Ind. 1979)

[5] Jones v. Latexo Independent School District, 49 U.S.L.W. 2232 (E.D. Tex. 1980)

SPEECH AND PUBLICATIONS

The issues of freedom of speech in both verbal expression and in printed form such as the school newspaper again illustrate key differences in the law as applicable to private rather than public education. Under the broad brim of the free expression umbrella, which includes not only the student's expression of his ideas but the student's right to receive the ideas of others, federal courts have upheld in public schools the wearing of black arm bands,[1] the wearing of freedom buttons,[2] the refusal to participate in the Pledge of Allegiance to the Flag,[3] the distribution of underground newspapers,[4] the inclusion of controversial and critical articles in school newspapers,[5] the right of students to hear speakers of various political views in the classroom,[6] and the inclusion of controversial materials in the school library.[7]

While the above-mentioned rights find their source in the First Amendment's guarantees of "free speech" and "free press," the Catholic school is not bound by them. The Fourteenth Amendment to the U.S. Constitution, which makes the First Amendment rights applicable to the states through a requirement of "state-action," exempts Catholic schools since they do not have the state contacts necessary to constitute state action. The exemption of Catholic schools from the pervasive interpretation of First Amendment free expression means that a Catholic school student's right to information and to express him/herself is limited by the contractual relationship between the school and the parent or child. Catholic schools are generally free to make their own independent judgments of what is acceptable information for a student to receive and what is acceptable literature for a student to read.

Catholic schools tend to be credal in nature with all of their policies appropriately reflecting a doctrinal position. Curriculum tends to be selected and a library policy followed which reflects a predetermined level of doctrines established by the Church. Catholic schools can be as

flexible as they wish in controlling their student's access to materials since courts will not inquire into the merits of their moral choices.[8] Catholic schools are generally free to impose any standard over student expression that is consisent with school and Church philosophy.

It is not unusual in many Catholic schools to find highly limiting policies on student expression in student and faculty handbooks:

Only literature approved by the administrator can be distributed by students or teachers on school property or at group meetings of school students during school hours.

Teachers may invite speakers to make presentations in classrooms of school students during school hours if prior approval has been secured from the administrator.

Such prior censorship provisions would likely be struck down in a public school, but Catholic schools have no constitutional constraints upon their restrictions.

The only two constraints upon a Catholic school's unfettered control of student expression are contract and minimum due process before dismissal, should such be necessary. A Catholic school which accords rights to students in a handbook concerning school publications, curriculum, or criticism of school policies cannot unilaterally break the contract during the school year. There may be some question whether handbooks form a part of a contract, but at least one court has stated that they do.[9] A Catholic school will be expected to live up to any rights it grants students in its literature and to established procedures. For students whose free expression exceeds the school's limitations, courts will not intervene to protect the student from discipline, including expulsion, as long as the student had some kind of notice that his/her conduct violated school rules and as long as the student had an opportunity to explain his/her position prior to imposition of discipline.[10] Notice requirements would be interpreted far more generously in favor of a Catholic school than for a public school.

Such standards as "immoral," "obscene," and "libelous" have in themselves generally been held to be inadequate in public schools but are defensible in a Catholic school because of its religious foundation. Courts will not interfere in a Catholic school's religious determination of what is "immoral," "obscene," or "libelous"; to do so would be to entangle the church and state.[11] Prohibition in student handbooks of such vague conduct as "immoral conduct" or "profane speech" or "obscene gestures" are specific enough in a Catholic school because the school's religious creed sets a high standard of moral conduct.

There is one more dimension to the problem that needs to be addressed and that is the right of parents to invoke handbook language on behalf of their children. The overwhelming majority of student constitutional rights actions against schools in the decade of 1968-1978 were brought by parents on behalf of their children. Students tend to adopt and reflect in school the beliefs and attitudes of parents. Where the student has had a handbook prohibition unreasonably applied to his/her conduct or has not had the procedural fairness required in the handbook, then the parent can intervene on behalf of the student. Such intervention is only reasonable because the contract for admission of the child is between the parent and the school.

Discussion Questions

1. If Catholic schools intend to train students for life, how much exposure should students have to the terminology and ideas of the world?
2. What advantages are gained in banning books from a Catholic school library to which a student has ready access in a public library?
3. William Benign, a prominent member of your church, and a substantial financial contributor to all phases of your program, objects strenuously to the presence of MS magazine in your church school's library, and he objects in general to the women's rights movement. Your school is in the midst of a major fund-raising campaign and Benign has implied that failure to remove the offensive magazine will affect his contribution. Your school handbook provides for a library committee composed of the administrator, librarian, English faculty, and five parents appointed by the administrator for a one-year term. The responsibility of this committee is "to be the sole determiner of accessions to the library" and furthermore "no library materials once approved by the committee are to be removed without the evaluation and approval of the library committee." MS magazine was approved for inclusion in the library two months ago by a five to four decision of the library committee. As administrator what should be your course of action?

   Would students in the Catholic school have any legal recourse if you simply took all copies of MS magazine out of the library without seeking approval of the library committee and cancelled the magazine subscription?
4. The parents of Alfonzo are members of a liberal Protestant church, and for the past year have been very active in the pro-abortion and family planning movement. Alfonzo has adopted his parents' beliefs that abortion is a matter of personal choice for the woman

and that the use of contraceptive devices is solely a practical matter to be resolved by each husband and wife. His parents enrolled Alfonzo in a Catholic school in the fifth grade for academic and discipline reasons; he is now in the ninth grade.

As a member of the creative writing class, Alfonzo was assigned to write and read aloud a paper expressing his beliefs on some issue of importance to him. Alfonzo presented a paper which was a vitriolic attack on the Pope for his position on abortion and contraception. When Alfonzo finished, he was met by both cheers and boos, and the teacher had considerable difficulty maintaining order. In less than 24 hours, Alfonzo's remarks have generated considerable controversy throughout the school, and some of the more conservative Catholic parents are demanding that Alfonzo be disciplined.

The school curriculum guide defines the purpose of the creative writing course as "an encouragement of students to learn to systematize their beliefs and to focus their imagination upon clear, concise, and coherent expression." The student handbook provides a possible punishment of suspension or expulsion for "conduct inimical to the best interests of the school" and for "conduct causing disruption of the learning environment in the school." As administrator of the school, what should be your course of action?

Speech and Publications

Commentary Related to Discussion Questions

1. The amount of involvement with the world will depend upon the religious organization's concept of the world. The Amish consider the world to be a diabolically controlled system harmful to their spiritual best interests and therefore the less contact the better. For most religious schools, the purpose of education is to

train young people to cope in a complex and impersonal society. Preparation for life generally involves the impartation of moral principles as the basis for life action. But it is difficult to teach principles of right conduct when there are no specific wrong examples against which to apply the principles. Some adjustment might be made in the curriculum to allow exposure to different concepts if students are to be taught how to apply the moral principles.

2. There is no advantage from the student's viewpoint. The school cannot presume to control his reading material off campus. The control of student reading material during non-school hours can best be left only with the parents. The school's interest in exercising censorship would be to preserve a certain moral image consonant with its religious doctrinal position. The school's control extends not only to its own library and curriculum but also to books which students bring into school. The student's right to determine his own reading fare outside school does not include his right to bring into the school material specifically prohibited by the school or inconsistent with the school's predetermined code of acceptable literature.
3. An attempt by an administrator in the public school to remove the magazine without going through the designated library committee would be a mistake. Some courts have attached a concept of "book tenure" to materials already in the library and their removal requires some legitimate government interest. In Catholic schools "book tenure" does not exist and books may be removed at any time for any reason. However, where the school has chosen to limit its removal right by contract-type language, the school would seem to be bound by that language. The handbook language may leave some administrative maneuverability. The administrator could permanently check-out all copies of MS magazine. He could cancel the subscription as part of a financial retrenchment. It is difficult to imagine a library committee in a Catholic school being given this

kind of authority; but once granted, the procedures should be followed until the handbook is changed for the succeeding year based on desire of the school.

4. Two issues are framed by the question: "Was the speech content justifiable?" and "Should the student be punished?" The answer to either question would affect the right of the school to punish the student, even by expulsion. Courts will not interfere in a Catholic school's determination that an attack on the Pope is detrimental to school discipline. Alfonzo is entitled to an opportunity to explain his position. It is possible that the teacher's directions were inadequate and it is possible that the teacher approved the student's topic without realizing the Pope would be personally attacked. It may be *possible* that a student should not be punished if the student followed the teacher's instructions, but a Catholic school has the *legal power* to punish a student in the given set of facts.

Speech and Publications

Notes

[1] Tinker v. Des Moines Independent School District, 393 U.S. 503 (1968)
[2] Burnside v. Byars, 363 F. 2d 744 (5th Cir., 1966)
[3] Frain v. Baron, 307 F. Supp. 27 (E.D.N.Y. 1969)
[4] Scoville v. Board of Education, 425 F. 2d 10 (7th Cir., 1970)
[5] Gambina v. Fairfax County School Board, 429 F. Supp. 731 (E.D. Va. (1977)
[6] Wilson v. Chancellor, 418 F. Supp. 1358 (D. Ore. 1976)
[7] Salvail v. Nashua Board of Education, 469 F. Supp. 1269 (D. New Hamp. 1979)
[8] See Dolter v. Wahlert High School, 483 F. Supp. 266 (N.D. Iowa, 1980)
[9] See Toussaint v. Blue Cross and Blue Shield of Michigan; Ebling v. Masco Corp., 408 Mich. 479 (1980)
[10] Flint v. St. Augustine High School, 323 So. 2d 229 (1976)
[11] See Brown v. Dade Christian Schools, 556 F. 2d 310 (5th Cir., 1977)

SUSPENSION AND EXPULSION*

It was suggested in the initial chapter of this text that court-established legal guidelines for public schools be viewed as viable parameters for Catholic schools if such guidelines prove useful and are consistent with Catholic educational philosophy. In viewing recent decisions on student suspension and expulsion, it is fairly clear that a viable set of procedures for dealing with these disciplinary acts does exist. These procedures deal with fundamental questions of fairness and reasonability and fall clearly within concerns of Christian justice (see Toward a Due Process Model). Their practical worth is dependent upon the given school and its environment.

While school suspensions and even expulsions have tended to be reviewed as significant disciplinary actions by a school, it was not until 1975[1] that the United States Supreme Court established some "guidelines" for public schools to follow in suspension cases with implications for expulsions. In essence, the Supreme Court emphasized the procedural due process rights of students, focusing on the need to make sure that a student had been "told" (at least verbally in short term suspensions, verbal and written if long-term suspension) why a suspension might take place and given an opportunity to defend himself/herself. *After* the "notice" and "hearing," the school official then proceeds with the decision to suspend or not. These procedures may be postponed if there is a danger to school personnel, students, property, or the "appropriate discipline" of the school. However, these components should occur as soon as possible.[2] In addition, what constitutes a hearing in a short-term suspension is ill-defined and may, in fact, simply be an informal discussion between the principal and the student.

The key case in this area is *Goss v. Lopez*. In deciding *Goss*, the United States Supreme Court overturned a statute from the State of Ohio which maintained that suspensions of ten (10) days or less did not require a hearing. The case

concerned a student suspended without a hearing when he was alleged to be part of a "riot" in a Columbus school. The court stated that a ten-day suspension "is a serious event in the life of the suspended child" and, "having chosen to extend the right to an education to people of appellees' class generally, Ohio may not withdraw that right on grounds of misconduct without fundamentally fair procedures to determine whether the misconduct had occurred.[3]

An additional point of interest in this case is that the Court has seemingly established that the concepts of suspension and expulsion are overbroad in definition and have established a three-prong context within which to discuss procedural due process and disciplinary action. Suspension-expulsion cases should now be thought of in the following breakdown:

1. Emergency suspension;
2. Short-term suspension;
3. Expulsion or long-term suspension.

In establishing these arbitrary break-points, the Court noted that there may be instances in which the nature of a problem is so severe that the "timeliness" for a hearing is inappropriate, particularly if there is potential danger. Again, however, the Court was very clear that, "as soon as practicable," the student suspended or expelled must be notified of the alleged charges, and a "rudimentary hearing" should follow.

While there was not a strong focus on emergency suspensions, principals should recognize the need to balance arguments of student safety with the concern of essential fundamental freedoms. It is our perspective that the quality of care of students is the underlying premise of a school's existence, and fear of suit is no solution to failing to act when there is danger at hand. A knowledge of *Tinker* and others will help clarify where that line might be drawn.

In terms of short-term, non-emergency suspension, the Court recognized a key problem. Justice White's majority opinion stated that no one procedure may apply in all imaginable cases, but "at the very minimum," students

must "be given *some* kind of notice and *some* kind of hearing." Specific points noted by Justice White were that . . . .

1. students were to receive oral or written notice of charges;
2. if the student denies charges, an explanation of evidence held and an opportunity to present his side of the story shall be provided;
3. there need be no delay between notice and hearing time, but students may be informed of discussions or allegations;
4. rights of counsel, cross-examination and calling of witnesses are *not necessary* in short-term suspensions;
5. trial type formalities are not necessary for short-term suspensions;
6. it is vital to permit students to offer their version of incidents;
7. some cases might require more formal proceedings, depending on the seriousness of the charge.[4]

Expulsion and suspension of more than ten days, said the court, *do* require more formal procedures. School expulsion hearings do not require the elaborate due process granted criminal allegations. Nevertheless, several well-defined requirements of due process have been determined by courts in public school cases since 1970 in addition to those noted above for suspension. We again note that these requirements are not mandated for Catholic schools, but *may* serve as guidelines.

The purpose of due process in expulsion or long-term suspension cases is to ensure a fair hearing for students against allegedly serious charges.

Catholic schools could well consider the following principles which have been established for the public schools:

1. Common law requires that the board of education is the authority to approve expulsion.[5]
2. The board can't simply confirm a principal's request; it must conduct its own hearings.[6]
3. The substance of the charges and the names of principle witnesses must be given in writing to students.[7]

4. Hearings must be conducted within a reasonable time after the allegations.[8]
5. Hearsay evidence may be permitted, but is not sufficient alone to justify expulsion.[9]
6. At the hearing the student may be represented by legal counsel.[10]
7. Hearings must include the student's right to fully present his side of the hearing.[11]
8. Cross examination of the witnesses may or may not be required. The problem is to weight the fairness to the accused against subjecting small children to the trauma of rigorous cross-examination. At present the process is unclear and must be evaluated carefully by the school's legal representative.[12]

In addition, a state *may* make its laws more restrictive as long as federal laws are not violated. Remember the following suggestions:

1. Publish school regulations regarding student offenses that might lead to suspension and/or expulsion.
2. Notify students of their "rights" (as determined by the Catholic school) under suspension and expulsion and inform the staff of the same information.
3. Understand that, even under public school law, emergency suspensions are clearly permissible in cases of immediate threat to school property, other students, or school personnel, but that even emergency suspensions should immediately be followed by appropriate hearings, etc., once the danger is no longer existent. Be clear that such standards of due process are not automatic in the Catholic school unless the school desires them.
4. Carefully document all information (regardless of time dimension) that may need to be brought forth and do it as objectively as possible. (See School Records)

Discussion Questions

1. What problems might occur should a Catholic school adopt the guidelines established in *Goss v. Lopez*? What advantages might exist?
2. What disciplinary acts in your school might result in short term suspensions? long term suspensions? expulsions? Do the procedures and penalties appear appropriate for the given act? Are present procedures adequate to inform students and parents of the processes involved in disciplinary concerns?
3. Is suspension or expulsion a valid educational tool in the development of a student?

Commentary Related to Discussion Questions

1. The primary problem may well be a loss of flexibility in dealing with certain disciplinary situations. Autonomy is particulary questionable if there is agreement to abide by rules that are so legalistic in nature that attorneys become part and parcel of certain procedures. Balancing this attitude is the concept that there is a need under a sense of Christian justice to maintain a set of reasonable and fair standards in dealing with disciplinary problems within a school.

   A more likely approach for any given diocesan system or individual school would be to view the elements of *Goss v. Lopez* for what they are, namely guidelines that do not bind the Catholic school, but provide options that should be viewed in terms of a felt need by a given system or school. For some, the totality of procedures established by Goss might be applicable and desirable (see Toward a Due Process Model) but others might find such application causing more problems than it solves. Given that the ruling is, again, a public school ruling, Catholic education can and should scrutinize before adopting.
2. The answers will clearly vary. However, such discussion can well focus within the context of an in-service program and provide a great deal of information for all. One might also entertain such discussions with parent and student groups to foster a better climate in which discipline occurs for the benefit of the school and student, not as a means to harm either.
3. This is a very difficult area. It requires the balancing of the individual's rights, hopes and desires against the group's rights. A disruptive student interfering with the rights of the group may make it very difficult for the group to receive the education which is its due. On the other hand, the Christian doctrine of forgiveness must be considered. Obviously, each school board must come

to a judgment as to what type of behavior will ultimately lead to suspension or expulsion. It is suggested that suspension and expulsion be used only in extreme forms of behavior which materially and substantially disrupt the educational process. Obviously, if the Catholic school cannot provide the proper facilities for the child's education because of his disruptive behavior, it may be incumbent on the Catholic school administrator to seek out from the public school ways in which such a child can be educated. This may include the student transferring to a particular public school which can deal with such students or obtaining necessary community funding and support to educate such a student within the Catholic school.

Suspension and Expulsion

Notes

*Substantial portions of this section are taken directly from Steve Permuth, et al: *The Principal, The Law, and Student Discipline* (Springfield, Illinois: Illinois Principals Association, 1980), pp. 138-142. Their permission is gratefully acknowledged.

[1]Goss v. Lopez, 419 U.S. 565 (1975)
[2]Ibid., at 583
[3]Ibid., at 574, 576
[4]Ibid., at 581-584
[5]State v. District Board of School District No. 1 116 N.W. 232 (Wis. 1908)
[6]Lee v. Macon County Board of Education, 490 F. 2d 458 (5th Cir. 1974)
[7]Smith v. Miller, 514 P. 2d 377 (Kan. 1973)
[8]Graham v. Knutzen, 362 F. Supp. 881 (D. Neb. 1973)
[9]Franklin v. District School Board of Hendry County, 356 So. 2d 931 (Fla. App. 1978)
[10]Graham, op. cit.
[11]Goss, op. cit.
[12]Smith, op. cit., Compare Boykins v. Fairfield Board of Education, 492 F. 2d 697 (5th Cir. 1974)

IV

TOWARD A DUE PROCESS MODEL

The concept of due process is a dynamic and developing model in the field of education. It is clear that in the public sector the concept of due process is viewed from a highly rigorous and legalistic manner, focusing on Constitutional and statutory interpretation of the meaning of the term as it relates to issues of fairness of substance and reasonability of process in dealing with student disciplinary concerns.[1]

The lack of legal compulsion for Catholic education to include a due process model need not imply that such a structure should be summarily dismissed. While the concept of "state action" may not apply, it is clear that the moral and philosophic ethic of fairness is embodied in a due process model.

The strength of developing such a model in a given school or diocese is that one is not held to the rigorous legal standard of the public domain.[2] A school may wish to provide a system of rules that falls short of or goes beyond the tenets of the law, depending on the particular objectives of the given unit or region. In doing so, the concept of due process can appropriately be perceived as a continuum, with each school unit deciding *which* issues (corporal punishment, suspension, verbal abuse) fit within due process considerations and *how* they fit. Under these standards each school has maximum flexibility to modify its procedures to effectively deal with students as individuals, not as a group.

Further, such a model of due process relates very closely to the parameters of the Christian model of justice. It would be very hard to argue that concerns of fairness, such as notice and a hearing regarding disciplinary acts, should not be applied.

It is recognized that there may be some negative responses to adopting a due process model or its components when not formally required under the law. First, the

implementation of such a model takes time and energy to apply and requires a careful review of rules and the reasons for them. Second, such a process carries the implicit assumption that the student may not be guilty of an infraction; this may cause the words or actions of a given teacher and/or administrator to be questioned.

If, on the other hand, a choice is made to look at the potential development of a due process model for your school, several suggestions are shared:

1. Review the rules and regulations affecting student rights and responsibilities in the school and develop a handbook on these issues, should one not already exist. This handbook should be provided to both students and parents with time to share concerns about items which might be unclear.
2. Specific infractions of a somewhat minor nature might involve oral *notice* to the student ("Johnny, you broke this rule") and an opportunity for the student to *respond* ("didn't" or "it wasn't my fault" or "guilty as charged") before a decision is made by the teacher/principal regarding disciplinary action (e.g., stay after school). At least this process gives the student an opportunity to be *heard* before the administration of a disciplinary action and certainly is a common sense approach to a problem of this sort.
3. A slightly different situation might occur if the potential punishment is a suspension for a day, recognizing that out-of-school suspensions are sometimes "wanted" by students and seem to reward rather than to alter behavior. If an act has the potential of such a suspension, a student should again be given oral notice and have a conference with the school principal. This gives the student a chance to have his/her side heard and should occur as soon after the incident as possible.

   In addition, it is desirable that the student's parents be informed and the suspension be for the next school day.
4. Suspensions for 2-5 days involve more significant

infractions (to be determined by the school) and would involve a somewhat more complex procedure again reflecting the philosophy that the greater potential deprivation to a student from gaining education, the higher the level of due process accorded.

In this situation, the principal would act as a decision-maker/judge by listening to the student, teacher, and other relevant parties to the issue before making a decision on a suspension and duration from two to five days. Before this "hearing," the student should be informed in writing (notice) of the time and place of the hearing as well as the accusation and potential punishment. The student should also be made aware of the fact that his side will also be heard. Parents should be invited to attend this "hearing."

5. Severe deprivation, normally construed to be suspension of five days through expulsion should involve a more formal hearing with the potential of the student going to a ruling board if not satisfied. The student and parents should be notified in writing of the accusation(s); what punishments may be applied; and his/her right to present evidence and question those who make the accusations. It may be desirable to allow legal counsel to represent the student should "fairness" be hurt if the student could not present his case effectively.

As we have stated throughout the text, there is no basic legal requirement that these statements be adopted by any Catholic school. A sense of some of these elements is likely to exist in many schools while others, such as the potential involvement of an attorney, may cause severe anxiety in terms of implementation. Regardless, a look at these provisions may help a school review rules and regulations to see how well they fit into the context of Christian justice overlapping the boundaries of man-made law. Such an evaluation is likely to have strong benefit for the school both in terms of the process of review and in the refinements made to adapt school rules to doctrines of fairness and reasonability.

Toward A Due Process Model

Discussion Questions

1. Is there a difference between being reasonable with a student and granting a student due process of law?
2. Is there a difference between substantive and procedural due process?

Commentary Related to Discussion Questions

1. All teachers and school administrators wish to use professional reasonable judgment in dealing with students. It may be reasonable to require a student to suffer the consequences of his own actions (for example, suspension for one day for violation of a rule) especially when the teacher him/herself has witnessed the event. Summarily punishing the student for the violation of rule may be reasonable. However, the concept of procedural due process requires some minimal *notice* and *hearing* to allow the student to explain him/herself before the punishment is inflicted. Consequently, it may be that the teacher would act in a reasonable fashion but would not be acting under a due process model.
2. There is a difference between substantive and procedural due process. In substantive due process, one looks to the very fairness of the law itself. For example, a law which requires children to sit perfectly still throughout the school day would probably violate fundamental fairness. In fact, it would probably violate the very essence of what it is to be a child. The law would ask: Does the substance of this law violate the concept of fairness? Procedural due process on the other hand speaks to the procedure or process a person is due before punishment is inflicted. So, rather than summarily punishing a person for a violation of a substantively fair rule, procedural due process would mandate that some form of notice and hearing be first given to that person.

Toward A Due Process Model

Notes

[1] *Goss v. Lopez* 419 U.S. 565 (1975)
[2] See *Olfelin v. Msgr. Farrell High School*, 353 N.Y.S. 2d 674 (1974)

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